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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-723

ADAMS COUNTY BOARD OF SUPERVISORS, SAMUEL L. CAUTHEN, A. BOYD SOJOURNER, JAMES H. CARTER, IKE FOSTER and E. A. REDD, members of the Adams County Board of Supervisors,

Petitioners,

vs.

REVEREND LEON HOWARD and BARNEY SCHOBY, individually and on behalf of all others similarly situated,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Board of Supervisors of Adams County, Mississippi, composed of James H. Carter, Samuel L. Cauthen, A. Boyd Sojourner, Ike Foster and E. A. Redd, Petitioners, respectfully pray as the governing body of said County that a writ of certiorari issue to review the final judgment rendered by the United States Court of Appeals for the Fifth Circuit in the cause styled Howard et al. versus Adams County Board of Supervisors.

OPINIONS DELIVERED IN THE COURTS BELOW

This cause has been tried twice by the United States District Court for the Southern District of Mississippi, Western Division, has been to the Court of Appeals for the Fifth Circuit three times and this Court has once rejected Respondents' petition for writ of certiorari sought on grounds other than the issue here presented by these Petitioners.

A copy of the opinion resulting from the first trial in June, 1971, is attached to this petition as Appendix 1. The opinion written by the Court of Appeals on an expedited appeal is reproduced as Appendix 2. The order of the Court of Appeals overruling Petitioners' motion to dismiss the appeal is attached hereto as Appendix 3. The opinion of the Court of Appeals "on the merits" is exhibited herewith as Appendix 4; the report of the case appears in 453 F.2d 455; cert. den. 407 U.S. 925, 32 L.Ed.2d 812, 92 S.Ct. 2461 (June 19, 1972). The District Court's memorandum opinion on the second trial in May, 1972, is attached as Appendix 5. The third opinion of the Court of Appeals is attached as Appendix 6 and is reported in 480 F.2d 978. Both Petitioners' and Respondents' petitions for rehearing and Respondents' petition for rehearing en banc were denied by order dated August 15, 1973, Appendix 7 hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit in this cause was entered on July 2, 1973.

The order of the Court of Appeals denying Petitioners' petition for rehearing and Respondents' petition for rehear-

ing and petition for rehearing en banc was entered August 15, 1973.

The jurisdiction of this Court to review the judgment herein is conferred by 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

The sole question sought by Petitioners to be reviewed by this Court is the propriety of the order of the Court of Appeals directing that, upon completion of the administrative details of implementing a new county redistricting plan, each of the five seats on the Board of Supervisors be filled by special election conducted under the Court-approved redistricting plan, all after each court which has heard any facet of this case has been constrained to hold that the Board in formulating its first redistricting plan, later held to be malapportioned, had compiled the plan in a good faith effort, free of social considerations and using the best then available demographic information. The upshot of the order is the possible defeat of an incumbent public official guilty of no wrongdoing whatever and the official being thereby divested of his office to which he had been lawfully elected and to which he, by said election, had acquired a vested and constitutionally inalienable right.

STATEMENT OF THE CASE

In the spring of 1966 the legislature of the State of Mississippi adopted an amendment to Section 2870 of the Mississippi Code which governed the election of five-man boards of supervisors for each of the counties of the State. The amendment provided for at large election of supervisors upon vote of a majority of the board. Shortly thereafter the Board of Supervisors of Adams County chose to

run at large. With less than twenty days left to the primary election of 1967, aggrieved plaintiffs in Adams County filed a suit to enjoin the election of supervisors on the theory that the amendment was a "change with respect to voting" within the meaning of the Voting Rights Act of 1965 and since neither the legislature nor the board of supervisors had submitted the change from district election to at large election of supervisors to the United States Attorney General for his approval pursuant to the Voting Rights Act, then the change of method of election and any elections thereunder were in violation of the new Act. A three-judge court was empanelled and held that the change was not covered by the Voting Rights Act. On appeal to the Supreme Court the holding was reversed and an injunction issued enjoining the board of supervisors from running at large unless and until the proposed change was approved by the United States Attorney General or the United States District Court for the District of Columbia, but the Supreme Court refused to void the elections. *Fairley* v. *Patterson,* 393 U.S. 544, 22 L.Ed.2d 1, 89 S.Ct. 817 (1969).

Adams County supervisor districts were at the time so grossly malapportioned that redistricting was essential. The population of the supervisor districts ranged from a low in District No. 2 of 800 people to a high in District No. 4 of 16,832. According to the 1970 census, the figures ranged from a low in District No. 2 of 1,073 to a high in District No. 4 of 15,074. That valid elections could not constitutionally be held with so vast a population deviation is obvious. Therefore on January 20, 1970, the Board of Supervisors entered into a contract of employment with Comprehensive Planners, Inc., a professional Mississippi firm engaged in the preparation for governmental bodies of redistricting and reapportionment plans. The firm was employed by the Board to prepare such a plan for Adams County, Mississippi, looking to equal apportionment of the

population of Adams County among the five supervisor districts. The firm promptly entered upon the performance of the task at a time, however, when 1970 United States Census Bureau figures were not available for use by them in the compilation of the plan and were not to become available until middle to late March of 1971. (App. 1, p. A38) Comprehensive Planners resorted to use of the 1960 census figures (the best then available) brought to date by Comprehensive Planners' manual count of occupied houses in the County and determination of total population of the County by applying to the house count the 1960 official census house count occupancy factor. The occupied houses were noted on a map and thus the population total as well as the location of the people was recorded. (App. 1, pp. A15, A22)

In September, 1970, a tentative plan was presented to the Board and was formally adopted by the Board of Supervisors on November 2, 1970. On November 6, 1970, the plan was submitted to the United States Attorney General for his approval pursuant to the Voting Rights Act of 1965. In almost precisely double the time permitted the United States Attorney General by the Voting Rights Act the Attorney General by letter dated March 3, 1971, advised the Board of Supervisors that he "will not at this time interpose any objection to the implementation of the changes proposed in the redistricting plan." During the pendency of the United States Attorney General's decision on the plan, the Respondent Schoby and others objected to that portion of the redistricting plan which called for a reregistration of voters. In response thereto the Board of Supervisors rescinded the reregistration requirement and instructed the Circuit Clerk to administratively transfer the names of all registered voters to their proper new districts under the plan. That rescinding order was submitted to the United States Attorney General on February 16, 1971,

and as aforesaid the Attorney General's approval of the redistricting plan without the reregistration was posted March 3, 1971. (App. 1, pp. A38-A39) Immediately upon receipt of the Attorney General's letter the Circuit Clerk began the transfer of the name of each registered voter to his proper new election district and supervisor district. Each registered voter was notified by mail of his new election and supervisor district and the place at which he would vote. Substantial publicity was given to the new plan including printing and distribution of twenty thousand maps depicting the plan both inside the City of Natchez and in the County. Maps of each of the districts were also published in a local newspaper. (App. 1, p. A18)

On May 5, 1971, while Petitioners were in the midst of the transfer administratively of the names of registered voters and of informing each as to his new voting place, the Respondents filed their complaint couched in three counts, that the Attorney General had failed to properly perform his duty under the Voting Rights Act, that the plan was unconstitutionally racially discriminatory and was a racial gerrymander, and thirdly that the plan was malapportioned. During the pendency of the suit and prior to the trial thereof on June 22, 1971, the Defendants had no alternative but to continue with the task of transferring the names of approximately 20,500 voters in preparation for the August, 1971, party primaries. The Circuit Clerk's task was not made easier by the decision of the United States Supreme Court extending the franchise to 18 year olds, which decision was made within a few weeks of the party primaries. In any case, the Clerk performed his task during the pendency of the action. (App. 1, p. A18)

On June 20, 1971, the United States District Judge rendered his memorandum opinion. (App. 1) The District Judge restated the holding of the three-judge court con-

vened to hear only the Voting Rights Act question that the redistricting plan then in question was properly submitted to the Attorney General of the United States as required by Section 5, that the Attorney General who is presumed to have regularly and legally performed the duties of his office, not only failed to object to the redistricting plan, but specifically stated that he had no objection thereto after having previously requested from and having been furnished by the Petitioners additional information concerning the racial composition of each of the then existing and the newly proposed supervisor districts of Adams County. (App. 1, p. A7) Continuing, the opinion reflects the dissolution of the three-judge panel after decision of the one question. The District Judge then addressed himself to the two remaining issues, both of which he tried. In a lengthy and detailed opinion he concluded, among other things, as ultimate facts, that upon retention by the Petitioners of Comprehensive Planners, Inc., to formulate a redistricting plan, Comprehensive Planners, Inc., utilized the 1960 census figures and all other currently available data to equalize the population of the five supervisor districts and, while in the process and as a practical matter and purely secondary consideration, attempted to equalize both the road mileage of the districts and the area of the districts without in anywise sacrificing equality of population. (App. 1, p. A15) The task was performed by Comprehensive Planners, Inc., without instructions from any of the Petitioners or anyone else touching the racial makeup of any of the districts, nor were instructions given to Comprehensive Planners, Inc., to consider any individuals or groups of individuals or areas of the county in its formulation of the new district lines. (App. 1, p. A15) Further, the District Court found that the November 2, 1970, plan utilized 1960 United States Census Bureau figures as the 1970 census figures were not available and did not become avail-

able to anyone until February or March of 1971, the spring before the summer primary elections. (App. 1, p. A17) The Court found that when tested by 1960 census figures the Defendants' redistricting plan wholly complied with the one-man, one-vote requirement but that when tested by 1970 census figures, failed to meet that constitutional requirement. (App. 1, p. A36) The Court then concluded that Petitioners had in good faith redistricted the county without consideration of race, that the Respondents had failed to sustain their burden of proving charges of racial discrimination and that the redistricting plan was wholly free of racially discriminatory purpose or effects and was free of any taint of racial gerrymander. The Court then concluded with enumerated findings of fact, some of which are as follows:

> ". . . (1) that in June, 1965, the State of Mississippi abolished all of its registration requirements other than that the applicant be of the age of majority, have two years' residence in the State and be able to read and write,[12] the voters of Mississippi ratified the necessary constitutional changes on August 17, 1965, and the Attorney General of Mississippi instructed county registrars to use a simple short registration form; (2) the record fails to show any substantial evidence of acts of intimidation or coercion designed to inhibit Blacks from registering in Adams County since 1965, but on the contrary, this Court finds that there has never been any intimidation, threats or economic reprisals against Blacks to prevent their registering or voting in Adams County since 1965; (3) a re-registration requirement originally ordered by the Board of Supervisors of Adams County was revoked; (4) the Adams County

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"12. See 1965 Amendments to Mississippi Constitution, §§ 244, 241 (a) and revisions of Mississippi Code, §§ 3209.6, et seq., and repealed § 3212.7.

Board of Supervisors through the agency it employed to produce a workable and constitutional redistricting plan did so based upon the latest available Census figures (the 1960 Census data) at the time of the adoption thereof, November 2, 1970, and this plan was completed prior to availability of 1970 census figures which did result in a wider variation of population between districts; (5) the redistricting of Adams County was accomplished without the purpose or effect of overturning a Black majority in District 4 or in unconstitutionally diluting the Black Vote in that district or in any other district, including District 4 or any other district of Adams County; (6) none of the new districts contains any element or segment of the population to the exclusion of or different from any other district, that is, each district includes residents of the rural area of Adams County as well as those residing within the incorporated City of Natchez; (7) although 1970 Census data was available to the plaintiffs since February or March 1971 they nevertheless did not file their suit herein until May 5, 1971, and did not attempt to inject the question of malapportionment until June 17, 1971, just five days prior to the hearing of this matter; furthermore, the Amended Motion to Amend to add Count III to the Complaint was first called up during the trial of this matter on June 22, 1971, the plaintiff then well knowing that first primary elections were to be held under Mississippi law on August 3, 1971, with less than 30 days remaining from the time set by the Court at the request of the parties for the post trial submission of Proposed Findings of Fact and Conclusions of Law before the primary election date. Equity does not assist those who slumber on their rights; (8) The Defendants have adopted the most expeditious method of implementa-

tion of the plan with no re-registration requirement but the names of registered voters were transferred from the old to the new district poll books, beginning on March 10, 1971, seven days after the Attorney General of the United States voiced no objection to the implementation of the redistricting plan in question, and this procedure was still incomplete and in progress at the time of the trial of this case at which time the promulgation of information to registered voters of changes in districts, precincts and polling places still remained incomplete; . . . (11) the effort to redraw the district lines would require and result in the splitting of the 1970 Census Enumeration Districts and the calculation or estimate of the population of each part, which even plaintiffs confess would be unavoidable; (12) the plaintiffs were requested to, but offered, no alternate plan; . . ." (App. 1, pp. A37-A40)

Continuing the chronology of developments in the case, the District Court's decision required that the Petitioners file with the Court not later than December 1, 1971, a revised or modified redistricting plan which more nearly equalized the population of the five districts. The opinion found as above showed that the plan was free of racial discrimination and gerrymander but was malapportioned. The decision further approved the spoke-like configuration of the districts, each emanating from the center of population in Natchez and diverging into the county and rural areas and generally approved the other considerations with which Petitioners were concerned in adopting the plan.

Immediately after the decision and even before entry of judgment, Respondents prosecuted an expedited appeal. The trial court's opinion was rendered July 20, 1971. The order of the Court of Appeals on Respondents' motion for injunction pending appeal or alternatively for an expedited

hearing (App. 2) was dated July 29, 1971, and was entered by the Court of Appeals without any consideration of the record in the case. (App. 2, p. A44) In the order for the first time in the case a new election had been ordered utilizing the December 1, 1971, "revised or modified" plan:

> "It is further ordered that upon the approval of a legally sufficient plan by the district court, and, in any event, not later than May 16, 1972, the district court shall order that a final election be held under the laws of the State of Mississippi in the five (5) respective districts (beats) of Adams County for the selection of a board of supervisors in compliance with the one-man, one-vote mandate of the United States Constitution. Those supervisors elected pursuant to the terms of this order shall assume and hold the offices to which they are elected within thirty (30) days after such election."

The Court of Appeals in the order of July 29, 1971, retained jurisdiction of the racial discrimination and racial gerrymander features of the case for consideration "when the case is finally submitted to this court for hearing on the merits."

Conceiving that there was little of the first plan (November 2, 1970) which would be material in an appeal at that stage, Petitioners filed a motion to dismiss the appeal of the racial discrimination and racial gerrymander facets of the case as moot since the plan was required to be revised or modified. The motion was denied

> "for the reason that the relief granted in the order of July 29, 1971, was in aid of the appellate jurisdiction of this Court and should remain in effect pending the disposition of the appeal on the merits, which will follow in due course." (App. 3, p. A45)

All parties and the Court have considered and treated the order for new elections as interlocutory and a matter that would later be treated with when the whole case was heard "on the merits."

The only questions which were at issue on the first formal appeal, that is, the first appeal in which the full record was before the Court, were questions of racial gerrymander and dilution of black voter strength. On that appeal the case was heard by Judges Gewin, Goldberg and Dyer. The Court of Appeals on the first formal appeal did not consider the matter of new elections. In rendering its opinion of January 6, 1972, the panel noted:

> "The district court in this case found that the population of the new districts deviated in equality to such an extent that they are unconstitutional under Abate v. Mundt, 1971, 403 U.S. 182, and ordered the Board to present a constitutionally acceptable modification to the plan by December 1, 1971, in order to comply with the one-man, one-vote requirement. This Court, in denying a motion by plaintiffs for an injunction pending appeal, ordered the Board, upon approval of a plan by the district court, or not later than May 16, 1972, to hold final elections for the Board under a constitutionally acceptable plan. *These orders are, of course, not at issue in this appeal.*" *Howard* v. *Adams County Board of Supervisors,* 453 F.2d 455 (1972) at 456, Note 1. (App. 4, p. A47)

Reading all of the orders of the various panels of this Court, it is inescapable that at no stage in these proceedings have Petitioners been afforded a "hearing on the merits" of the issue of new elections. The Court in its opinion of July 2, 1973 (Wisdom, Gewin and Coleman) passed over consideration of the matter by saying:

> "Such an election has already been ordered by a prior panel of this court. The present panel is no more at liberty to set aside that order than to reverse the decision of the prior panel on the racial dilution issue, nothing new nor material being raised." *Howard* v. *Adams County Board of Supervisors*, 480 F.2d 978 (1973) at 980. (App. 6, p. A73)

At this stage the Petitioners find themselves in the very unusual and certainly unenviable position of having been assured a hearing on the question of a new election only to find that at the time which the first Court of Appeals panel directed it to be heard, that is, at "the disposition of the appeal on the merits" (App. 3, p. A45), the second panel of the Court of Appeals refused to consider Petitioners' argument, saying "Such an election has already been ordered by a prior panel of this court." Supra, 480 F.2d 978, at 980 (App. 6, p. A73).

After the decision by the Board of Supervisors in the fall of 1969 to redistrict the County, Comprehensive Planners began its work. Full preparation of the plan, approval by the United States Attorney General and implementation of the plan consumed nineteen months. As it was, the plan was completed only days before the August, 1971, party primary elections. As shown earlier herein, the 1970 official census figures did not become available to anyone prior to late February or March of 1971, the year of the elections. For this Court to allow the order for new elections to stand is to hold that Petitioners should have awaited the publication in February or March, 1971, of 1970 census figures before the redistricting effort was commenced. Such a holding allows only five months within which to complete a plan which in actual fact required nineteen months. That such a holding is both unrealistic and impractical is made obvious by the facts that:

1. Formulation of the November 2, 1971, plan actually required ten months.
2. Consideration of the plan by the Attorney General after submission to him required four months.
3. Administrative transfer of names, notification of registered voters and other administrative acts required five months.

Realistically, it cannot be said that Petitioners had any other course open to them than the one which they chose.

The point is obvious—Petitioners could not permit elections to be conducted without redistricting; they could not defy the Marsaw injunction and run at large, and now they are told they could not pursue the only course left open—to confect a redistricting plan using the only official population figures then in existence.

In any case, the November 2, 1970, plan was formulated, approved by the United States Attorney General and implemented. The present Board of Supervisors, Petitioners herein, ran for election and were elected from the districts established in that plan. They are now to be forced to vacate their offices and offer for reelection prior to the expiration of the constitutionally established terms of office on the theory that the districts from which they were elected were unconstitutionally malapportioned. The districts, tested by 1960 census figures, vary in population as shown by the following table:

District No.	White	Non-White	Total	Over or Under Ideal	% Over or Under Ideal
1	4,442 (56.2%)	3,459 (43.8%)	7,901	-39	-0.5%
2	4,708 (60%)	3,139 (40%)	7,847	-92	-1.16%
3	4,267 (52.7%)	3,823 (47.3%)	8,090	+150	+1.89%
4	2,606 (33.2%)	5,255 (66.8%)	7,861	-79	-0.9%
5	4,895 (61.2%)	3,104 (38.8%)	7,999	+59	+0.7%
	20,918 (52.7%)	18,780 (47.3%)	39,698		

It is seen that the largest variation from the ideal district of 7940 occurs between District #2 which is 92 below the ideal, or -1.16% variation, and in District #3 which is 150 above the ideal or +1.89 variation. The total spread is then 3.05% from the smallest to the largest district. (App. 1, p. A16)

When the same plan is judged by the 1970 census figures, the following table results:

trict No.	White	Non-White	Total	Over or Under Ideal	% Over or Under Ideal
1	3,586 (54.6%)	2,976 (45.4%)	6,562	-897	-12%
2	4,466 (60.2%)	2,955 (39.8%)	7,421	-38	-0.5%
3	4,183 (50.9%)	4,031 (49.1%)	8,214	+755	+10%
4	2,288 (33.2%)	4,602 (66.8%)	6,890	-569	-7.6%
5	4,843 (59.0%)	3,363 (41.0%)	8,206	+747	+10%
	19,366 (51.9%)	17,927 (48.1%)	37,293		

The latter table reflects that the largest variations from the ideal district population of 7459 appear in District #1 which is 897 below the ideal or -12% variation and in District #3 which is 755 above the ideal or +10%. The total spread of the largest to the smallest in terms of percentages of variation from the ideal is 22%. (App. 1, p. A16)

ARGUMENT

Divestiture of Petitioners of elected offices is unwarranted exercise of discretion.

Petitioners confess, as they must, that the matter of directing new elections to be held is within the sound discretion of the Court. However, it is also true that the trial court after the first trial of this cause, sitting as a chancellor, held that the elections for supervisor for the four-year term commencing January, 1972, should be founded on the districts as prescribed in the November 2, 1970, redistricting plan and that elections thereafter should be founded on the Court-directed December 1, 1971, plan.

> "Weighing competing values and balancing the inconveniences, in view of the foregoing facts and circumstances, the plaintiffs' prayer for a preliminary or permanent injunction to stay or delay the holding of the primary and general elections in Adams County for the year 1971 will be denied." (App. 1, p. A40)

and

> "(T)his Court feels that it would be more equitable and practicable to permit the primary and general elections to proceed district wide in Adams County in 1971." (App. 1, p. A40)

These findings of fact by the District Court are amply supported by the record and that they must not be set aside unless clearly erroneous is a fundamental premise of appellate practice. *U. S.* v. *Leflore County, Miss.*, 371 F.2d 368 (1967) (C.A. 5th), citing with approval *U. S.* v. *Board of Education*, 332 F.2d 40 (1964) (C.A. 5th); *Glasscock* v. *U. S.*, 323 F.2d 589 (1963); Rule 52(a) *Federal Rules of Civil Procedure.*

The propriety of the order for new elections which was contained in the order of the three-judge panel of the Court of Appeals dated July 29, 1971, is now questionable in light of the decision of the United States Supreme Court on January 24, 1972, in the case of *Connor* v. *Williams*, 404 U.S. 549, 30 L.Ed.2d 704, 92 S.Ct. 656. There this Court in considering elections held pursuant to a redistricting plan formulated by a United States District Court for the state legislature of Mississippi in which the variance between the largest and smallest House districts was 19.7% and in the Senatorial districts was 18.9%, held:

> "(1) But conceding, arguendo, that the District Court's plan does not precisely square with Fourteenth Amendment requirements, it does not necessarily follow that the 1971 elections must be invalidated and new elections ordered . . . In the circumstances of this case, we decline to disturb these elections."

This Court can take judicial notice of the fact that legislative terms in Mississippi are four years. The elections in *Connor* were held at the same time as were the elections of supervisors in the case sub judice. The variance from the ideal district in *Connor* was 19.7% for the House and 18.9% for the Senate; in the case at bar the variance from the ideal was 22% at the very worst. Defendants submit that the difference of slightly over two percentage points between *Connor* and the case at bar does not distinguish the latter from the former. This is particularly true in light of the holding in *Abate* v. *Mundt*, 403 U.S. 182, 29 L.Ed.2d 399, 91 S.Ct. 1904 (1971), that:

> "In assessing the constitutionality of various apportionment plans, we have observed that viable local governments may need considerable flexibility in municipal arrangements if they are to meet changing societal needs, Sailors v. Kent Board of Education, 387

> U.S. 105, 110-111, 18 L.Ed.2d 650, 654, 655, 87 S.Ct. 1549 (1967). . . . These observations, along with the facts that local legislative bodies frequently have fewer representatives than do their state and national counterparts and that some local legislative districts may have a much smaller population than do congressional and state legislative districts lend support to the argument that slightly greater percentage deviations may be tolerable for local government apportionment schemes, cf. Reynolds v. Sims, supra, at 578, 12 L.Ed.2d at 536." 29 L.Ed.2d at 402.

Significant to the question of good faith and honest effort at redistricting is the case of *Fairley* v. *Patterson*, 393 U.S. 544, 22 L.Ed.2d 1, 89 S.Ct. 817 (1969), in which appellants sought to have set aside elections which were held pursuant to enactments effecting a change with respect to voting which had not first been submitted to the United States Attorney General or the District Court for the District of Columbia pursuant to the Voting Rights Act of 1965. The Court said in declining to set aside the elections and provide for new elections:

> "These Section 5 coverage questions involve complex issues of first impression—issues subject to rational disagreement. The state enactments were not so clearly subject to Section 5 that the Appellees' failure to submit them for approval constituted deliberate defiance of the Act." Supra, 393 U.S. at 572, 22 L.Ed.2d at 20.

In *Georgia et al.* v. *U. S.*, ... U.S. ....., 36 L.Ed.2d 472, 93 S.Ct. ..... (1973), decided May 7, 1973, the United States Supreme Court declined to call new elections for the Georgia legislature even though the state redistricting plan under which the state legislature is now holding office was held by that Court to have been implemented in direct

violation of the Voting Rights Act. Furthermore the Supreme Court has clearly expressed its conclusion that local government reapportionment questions must be judged by more lenient standards than are congressional redistricting plans. *Abate* v. *Mundt,* supra, is the Court's clear mandate. *Mahan* v. *Howell,* ..... U.S. ....., 35 L.Ed.2d 320, 93 S.Ct. ....., decided February 21, 1973, is the Court's most recent pronouncement in the reapportionment field. There the Supreme Court approved a state legislative reapportionment plan in which the deviation from the largest and smallest districts was 16.4 per cent.

In the case sub judice the maximum deviation between the largest and smallest districts when tested by 1960 census figures is 3.05 per cent and when tested by 1970 census figures is 22 per cent. These figures, it is earnestly submitted, fall within the constitutionally permissible limits of deviation from the norm, all of the circumstances and equities considered. This is particularly true in light of the confession of the United States Bureau of Census that in 1960 the census figures were incorrect by an overall undercount of 2.7 per cent and in 1970 by an overall undercount of 2.5 per cent. The overall black undercount was 7.7 per cent and overall white undercount was 1.9 per cent. These figures are a part of the official verification of 1970 census figures as exemplified by the certified statement of the U. S. Bureau of Census contained in Appendix 8 to this petition.

Application of the Bureau of Census overall undercount percentage to the published 1970 census population figure for Adams County raises the county population to 38,325, which is 1,373 less than Comprehensive Planners computed the population to be using the 1960 census house count factor and its own, actual, current house count. More significantly, applying black and white undercount

factors to the 1970 Census Bureau black and white population figures for Adams County brings the total population of the county to 39,040 or 658 people less than the 39,698 figure computed by Comprehensive Planners in its November 2, 1970, plan. The percentage of deviation between Comprehensive Planners' population computation and the corrected 1970 census figures is 1.9%.

Without further belaboring the point, it must be clear that the Court has required a new election for supervisors at considerable cost to the taxpayers and is thereby pecuniarily punishing the elected supervisors and divesting them of office, all founded upon a set of numbers which, at best, are admittedly faulty. When corrected the 1970 census figures and Comprehensive Planners' computation of the 1970 county population deviation is so small that it is negligible. The error in district population must likewise be small. The comparison of the corrected 1970 census figures imports real accuracy to Comprehensive Planners' population figures and hence to its plan.

The percentages of population deviations between the supervisor districts of the November 2, 1970, plan under which Petitioners now hold office are so small as to suggest the application of the maxim of "lex non curat de minimis." By the time new elections can be held regular statutory terms provided for supervisors will be nearing expiration. The regular statutory elections to fill the office will occur six months in advance of the expiration of the terms. For the Court to now order a new interim election is to unnecessarily impose on the electorate public and elected officials inequitable burdens of expense and confusion. The population of each supervisor district is now constitutionally represented. Considering the public interest, to what significant public end an interim election?

CONCLUSION

For the reasons stated herein, Petitioners respectfully pray that this petition for writ of certiorari be granted.

Respectfully submitted,

L. C. GWIN
LUCIEN C. GWIN, JR.
Of GWIN & GWIN
Attorneys at Law
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CERTIFICATE

I hereby certify that I have served three (3) printed copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit upon Frank R. Parker, attorney for Respondents, they being all parties required to be served, by depositing said copies in the United States mail, first class air mail postage prepaid, in an envelope addressed to said attorney at 233 North Farish Street, Jackson, Mississippi 39201.

THIS 1st day of November, 1973.

LUCIAN C. GWIN, JR.
Of GWIN & GWIN
Attorneys at Law
P. O. Box 1384
Natchez, Mississippi 39120
Attorneys for Petitioners

APPENDIX

APPENDIX 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

CIVIL ACTION NO. 1352

REVEREND LEON HOWARD and BARNEY SCHOBY, Individually and on behalf of all others similarly situated
PLAINTIFFS

VS.

ADAMS COUNTY BOARD OF SUPERVISORS, ROBERT E. (BOB) BEE, BOYD SOJOURNER, JAMES H. CARTER, IKE FOSTER and ELMORE REDD, as Members of the Adams County Board of Supervisors
DEFENDANTS

MEMORANDUM OPINION

(Filed July 20, 1971)

This suit was filed in equity for declaratory and injunctive relief against the enactment, administration or enforcement of a county redistricting plan adopted by the Board of Supervisors of Adams County, Mississippi on November 2, 1970, and in all other Mississippi counties similarly situated, different from those in force or effect on November 1, 1964, which the plaintiffs contend are unenforceable for failure of the counties involved to obtain "proper clearance of new redistricting schemes as required by § 5 of the Voting Rights Act, 42 U.S.C. § 1973(c)." In addition, plaintiffs seek declaratory and injunctive relief against the administration and enforcement by the Adams

County Board of Supervisors of the redistricting plan enacted on November 2, 1970, as racially discriminatory and violative of rights secured by the Fourteenth and Fifteenth Amendments to the United States Constitution and 42 U.S.C. §§ 1971, 1973 and 1983. Jurisdiction is based on 28 U.S.C. §§ 1343, 2201 and 2202, and 28 U.S.C. §§ 1971(d) and 1973(j)(f). Inasmuch as this action was in part brought under § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, a Three Judge District Court was requested and constituted by the Chief Judge of this Circuit.

Each of the plaintiffs is described in the Complaint, and allegations of fact relating specifically to each are then made. Each plaintiff sues in his own behalf and on behalf of all other persons similarly situated. The Complaint, as originally filed on May 5, 1971, is framed in two Counts, each containing several paragraphs. Subsequently, a "Stipulation of Amendment to the Complaint" affecting some of the introductory paragraphs and a part of Count I was filed by the parties. Additionally, the plaintiffs filed an "Amended Motion to Amend Complaint" on June 17, 1971 just five days prior to the trial of this case in which they asked for leave of Court to amend their Complaint by adding a third Count consisting of four additional paragraphs charging malapportionment of the five new supervisors' districts in Adams County, which was objected to by the defendants and on which the Court reserved ruling during this trial, but permitted the parties to proceed with proof relative to proposed Count III of the Complaint. All of the above pleadings as well as the defendants' Answer are hereinafter summarized.

One of the two named plaintiffs, Reverend Leon Howard, is a black resident citizen of Natchez, Adams County, Mississippi. In the Complaint he is alleged to be a registered voter and fully qualified for, and presently intends to

qualify and run as a candidate for the Adams County Board of Supervisors in the 1971 primary and/or general elections in Mississippi. The evidence adduced at this trial shows that he has decided to run as an independent candidate in the general election, rather than in the Democratic primary. Prior to the challenged November 1970 redistricting of Adams County he resided in District 4 and allegedly intended to run for that District's Supervisor's post. After the redistricting his home was placed in new District 2. He testified during the hearing of this case on its merits before this Single Judge District Court that he has moved back into District 4 and will be a candidate for Supervisor's District 4 as an independent in the general election.

The other named plaintiff, Barney Schoby, is also a black resident citizen of Natchez, Adams County, Mississippi, who is a registered voter in Natchez and Adams County and who prior to the complained of redistricting resided in Supervisor's District 4 but as a result thereof now resides in District 5.

Although the plaintiffs in Paragraphs 1 and 6 of their Complaint sued for and on behalf of a class of voters and candidates for county supervisor positions in each county in Mississippi which seeks to enact or administer a redistricting of county supervisors' districts different from the district boundaries in force or effect on November 1, 1964, namely, all black citizens who seek or intend to qualify and run as candidates and/or are registered voters qualified to vote for candidates for the post of county supervisor in the 1971 primaries and elections for the county board of supervisors of each county in Mississippi which seeks to enact and administer any redistricting of county supervisors' districts different from those in existence on November 1, 1964, and in Paragraph 7 of Count I of the Com-

plaint sued a defendant class composed of county boards of supervisors and their members in all counties in the State of Mississippi who seek to enact or administer any redistricting of county supervisors' districts changing the district boundaries in existence on November 1, 1964, the parties hereto subsequently filed a "Stipulation of Amendment to the Complaint" in which they agreed, subject to the approval of the Court, which was given, to amend Paragraphs 1 through 13 thereof as follows:

> "1. To delete such portions of the Complaint which state that plaintiffs sue on behalf of a class of voters and candidates for county supervisor positions in each county in Mississippi which seeks to enact or administer any redistricting of county supervisor's districts different from the district boundaries in force or effect on November 1, 1964, and to amend the complaint as to Count I to define the plaintiff class in the same manner as defined in Paragraph 15 of the complaint;
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> "2. To delete such portions of the complaint which state that the action is against a defendant class composed of county boards of supervisors and their members who seek to enact or administer any redistricting of county supervisor's districts different from the district boundaries in force or effect on November 1, 1964, and to amend the complaint as to Count I to characterize the action as only against the Adams County Board of Supervisors and its members in their official capacities; and
>
> "3. That the caption of the action be amended accordingly."

Therefore, the two named plaintiffs Howard and Schoby are presently prosecuting this action for and on

behalf of themselves and all other black citizens of Adams County, Mississippi who seek or intend to qualify and run as candidates therein in the 1971 primaries and elections for the county board of supervisors and/or are registered voters qualified to vote for candidates for the post of county supervisors in Adams County, and against the Adams County Board of Supervisors and its members in their official capacities, all of whom are white resident citizens of Adams County, Mississippi.

The substance of Count I (Paragraphs 6-13) of the Complaint, which resulted in the constitution and convening of a Three Judge District Court composed of Honorable Charles Clark, U. S. Fifth Circuit Court of Appeals Judge, Honorable Dan M. Russell, Jr., U. S. District Court Judge, and the author of this opinion, which initially began hearing this case, was that the defendants had failed to comply with § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c. Specifically, plaintiffs alleged and contended that although the Adams County Board of Supervisors fully complied with § 5, that the Attorney General of the United States failed to apply the proper standards or make the proper findings required by that section of the Voting Rights Act, "including, but not limited to, failing specifically to make a finding that the redistricting proposals do not have the purpose or effect of denying or abridging the right to vote on account of race or color". Plaintiffs therefore prayed for the convening of a Three Judge Court pursuant to 42 U.S.C. § 1973c and 28 U.S.C. § 2284, and requested that this cause be advanced on the docket for an expeditious hearing, both of which requests were granted. They further asked that the redistricting plan of Adams County not be put into effect until and unless the proper requirements of § 5 had been complied with and that the Three Judge Court issue a preliminary and then a per-

manent injunction enjoining the Adams County Board of Supervisors and all persons acting in active concert or participation with them from administering, enforcing or otherwise putting into effect the November 2, 1970 redistricting plan or any other new redistricting plan from that in force or effect on November 1, 1964, until Adams County instituted an action in the United States District Court for the District of Columbia and obtained a declaratory judgment that the plan would not have the purpose or effect of denying or abridging their right to vote on account of race or color or until the new redistricting plan is resubmitted to the Attorney General of the United States followed by a specific finding by him that the plan did not have the purpose or effect of denying or abridging the right to vote on account of race or color.

In addition to answering and denying all of the allegations contained in Count I of the Complaint, the defendants filed their separate Motions to Dismiss Count I and To Dissolve the Three Judge Court on the ground that the defendants and the Attorney General of the United States had fully complied with the § 5 requirements inasmuch as the Attorney General of the United States through his assistant of the Civil Rights Division on March 3, 1971 wrote to the defendants' attorney, stating in part: "The Attorney General will not at this time interpose any objection to the implementation of the changes proposed in the redistricting plan . . ."[1]

The Three Judge Court which was convened on June 22, 1971 at Jackson, Mississippi to hear this case permitted both sides to fully present their cases relative to Count I of the Complaint, and after receiving all evidence and hearing arguments of counsel on Count I, independent of

1. See Exhibit "C" to the Complaint.

and preliminarily to the trial on the remainder of the Complaint, recessed, conferred, and then reconvened. The Court through the Presiding Judge, Circuit Judge Charles G. Clark of the Fifth Circuit, rendered an oral bench opinion finding that in accordance with the extensive stipulation filed with the Three Judge Court and the many exhibits attached thereto, that the redistricting plan in question was properly submitted to the Attorney General of the United States as required by § 5, that the Attorney General, who is presumed to have regularly and legally performed the duties of his office, not only failed to object to the redistricting plan, but specifically stated that he had no objection thereto after having previously requested from, and having been furnished by, the defendants, additional information concerning the racial composition of each of the then existing and newly proposed supervisor's districts of Adams County. This all took place subsequent to the Attorney General writing a letter to the Attorney General of the State of Mississippi on May 21, 1969 objecting to the implementation of an Amendment to § 2870 of the Mississippi Code of 1942 providing for at large elections of members of county boards of supervisors at the option of encumbent boards on the basis that this amendment had as its purpose and effect the denial or abridgment of the right to vote on account of race and color.[2]

Therefore, the Three Judge Court found that the plaintiffs had failed to sustain their burden of proving their allegations in Count I of the Complaint and dismissed it, treating and considering the defendants' Motion to Dismiss as a Motion for Summary Judgment. The Court then exercised its discretion to dissolve the Three Judge Court and leave the remainder of the Complaint and the proposed

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2. See Exhibit "D" to the Complaint.

Amendment thereto to be heard and decided by the undersigned Requesting or Managing Judge who proceeded to try this case after the above dissolution of and adjournment by the Three Judge Court, inasmuch as Count II and the proposed Count III constitute an attack on the exercise of statutory powers as distinguished from an attack on the constitutionality of a state statute of statewide application. *Moody* v. *Flowers,* 387 U.S. 97, 87 S.Ct. 1544, 18 L.Ed.2d 643 (1967); *Dyer, et al* v. *Rich, et al,* 259 F.Supp. 736 at 739 (N.D. Miss. 1966).

Count II of the Complaint purports to state a class action. Each plaintiff sues on his own behalf and on behalf of the class which he alleges to represent, namely, all Black residents of Adams County who presently intend to or who will in the future qualify and run as candidates in the primary or general election for the post of a member of the Adams County Board of Supervisors, and all Black voters of Adams County who are qualified to vote for such candidates. This Court was and is of the opinion that all the requirements for a class action under Rule 23, Federal Rules of Civil Procedure are satisfied, as alleged in Paragraph 8 of the Complaint, and has entered an Order permitting the prosecution of this action before this Court as a class action. In Count II, the plaintiffs allege, and the defendants in their answer filed on May 14, 1971, deny that the redistricting plan unanimously adopted by the defendant supervisors was racially motivated or was enacted for the purpose and effect of diluting the voting strength of Black voters of Adams County, and especially those residing in District 4 as it was constituted prior to the redistricting, or that it discriminated against Black candidates for the posts of members of the Adams County Board of Supervisors, preventing any Black candidates from ever

being elected to the Adams County Board of Supervisors, and denying and abridging the right of Black voters to cast an effective vote for Black candidates for the Adams County Board of Supervisors, on account of race and color, all in violation of plaintiffs' rights as secured by the Fourteenth and Fifteenth Amendments to the United States Constitution and by 42 U.S.C. §§ 1971, 1973 and 1983. Stated differently, plaintiffs attack the redistricting of Adams County, contending that the intent, purpose and necessary effect of the newly created districts will be to deny to them and the class which they represent, meaning Negro citizens of Adams County, their constitutional rights, and especially equal protection of the law. They ask this Court to issue a preliminary, and then a permanent, injunction enjoining the defendants and all those acting in concert or participation with them from administering and enforcing or otherwise requiring compliance with the November 2, 1970 redistricting of Adams County and from enacting or seeking to enact any other redistricting plan which has the purpose or effect of denying or abridging the right to vote on account of race or color.

Prior to the passage of the Voting Rights Act of 1965, qualified Black voters in Adams County, Mississippi were substantially disfranchised; however, after its passage a substantial number of Blacks therein registered to vote, as is alleged and admitted in Paragraph 17 of the Complaint. It was established through the testimony of the plaintiff, Howard, that approximately 3,000 black citizens of Adams County registered to vote in 1965 shortly after the passage of the Voting Rights Act, despite the fact that no Federal Registrar was apparently requested, needed or sent therein to assist in the registration of qualified Blacks. Furthermore, Reverend Howard's testimony established that 500 additional Blacks registered to vote in Adams County ap-

proximately two months prior to the trial of this case, and that at this time approximately 50% of the qualified Black electors of Adams County are registered to vote. This Court further finds, based upon the testimony on direct examination of the plaintiff, Barney Schoby, who has been one of the most active members in the voter registration drives and campaigns of Blacks in Adams County and who has belonged to the NAACP since 1964, that no threats or intimidation have ever been made or utilized against any Black qualified elector to prevent him from registering to vote or from voting in Adams County, and that in the 1967 elections, there was the largest turnout of Black voters in the history of Adams County which resulted in the election of a Black Justice of the Peace and a Black Constable from then District 4.

Boards of Supervisors in Mississippi, who constitute the governing body of each county, exercising executive, legislative and quasi-judicial powers, were created by the 1890 Constitution of the State of Mississippi, § 170.[3] The Mississippi legislature implemented the Constitutional provision by providing for the manner in which each county should be divided into districts, by the passage of § 2870 of

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3. Section 170 of the Constitution of Mississippi provides:

"Each county shall be divided into five districts, a resident freeholder of each district shall be selected, in the manner prescribed by law, and the five so chosen shall constitute the board of supervisors of the county, a majority of whom may transact business. The board of supervisors shall have full jurisdiction over roads, ferries, and bridges, to be exercised in accordance with such regulations as the legislature may prescribe, and perform such other duties as may be required by law; provided, however, that the legislature may have the power to designate certain highways as 'state highways,' and place such highways under the control and supervision of the state highway commission, for construction and maintenance. The clerk of the chancery court shall be the clerk of the board of supervisors."

the Mississippi Code of 1942.[4] Before the May, 1966 Amendment, this section of the Code provided that each county should be divided into five districts "with due regard to equality of population and convenience of situation for the election of members of the boards of supervisors", but that the districts then existing should continue until changed. This section further provided that the districts could be changed and altered by the boards, and established the method by which this could be accomplished. This 1966 Amendment provided an alternate method for electing members of the boards of supervisors with all the qualified electors of the county being eligible to vote for each member of the board, but with the provision that each candidate

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4. The part of this section relevant to the issues herein are:

"Each county shall be divided into five (5) districts; with due regard to equality of population and convenience of situation for the election of members of the boards of supervisors, but the districts as now existing shall continue until changed. The qualified electors of each district shall elect, at the next general election, and every four (4) years thereafter, in their district, one member of the board of supervisors; and the board, by unanimous vote of all members elected or when so ordered by a vote of the majority of the qualified electors of the districts affected voting in an election as hereinafter provided, may at any time, except as hereinafter provided, change or alter the district, the boundaries to be entered at large in the minutes of the proceedings of the board.

"The board, upon the petition of twenty-five per cent (25%) of the qualified electors of the county, asking that the districts of the county be changed, or altered, and setting out in such petition the changes, or alterations desired, shall call a special election for a date which shall be not less than thirty (30), nor more than sixty (60) days from the date of the presentation of the petition to the assembled board. A majority of the qualified electors of the county shall determine the issue of such election." (As this section existed before the 1966 amendment).

for membership of the board must be a resident of the district which he proposed to represent.[5]

The Voting Rights Act of 1965 passed by the Congress of the United States, became effective on August 6, 1965, and subsequently, the Supreme Court of the United States considered this Amendment to § 2870 in *Allen* v. *State Board of Elections*, 393 U.S. 544, 89 S.Ct. 817, 22 L.Ed.2d 1, (1969) and held that the State of Mississippi must comply with § 5 of the Act (42 U.S.C. § 1973c) in securing approval of the 1966 Amendment in the prescribed manner before it could be implemented.

After the *Allen* decision, the Attorney General of Mississippi submitted the amendments to § 2870 to the Attor-

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5. The pertinent part of this amendment is as follows:

"The board of supervisors of any county may adopt an order providing that all the qualified electors of the county shall be eligible to vote for each member of the board of supervisors but each candidate shall be a resident of the district which he proposes to represent; said order to be adopted and published in a newspaper having general circulation in the county at least twelve (12) months prior to the next general election wherein said supervisors are elected.

"If twenty per cent (20%) of the qualified electors of the county shall present the board of supervisors with a petition objecting to such alternate method within sixty (60) days after the adoption and final publication of any such alternative method, then the board of supervisors shall call an election after publishing notice thereof in a newspaper published in the county * * * once a week for at least three (3) weeks prior to such election and the question on the ballot shall be whether the entire electorate of the county shall be required to vote for the members of the board of supervisors at large, or whether the qualified electors in the said districts shall vote for the candidate in that district. If the majority of those voting vote that all the qualified electors shall be eligible to vote for candidates in each district, then thereafter all elections for members of boards of supervisors shall so be held. If not, members of the boards of supervisors shall continue to be elected by the electorate of their respective districts and the board of supervisors shall not be permitted to adopt this alternative method of electing members of boards of supervisors again until two (2) years have transpired."

ney General of the United States for his approval and he by letter dated May 21, 1969 (Exhibit D to the Complaint), advised the Attorney General of Mississippi that he did interpose an objection to the implementation of these amendments, which objection has not been withdrawn to date, nor did the State ever request or obtain a favorable declaratory judgment in the United States District Court for the District of Columbia pursuant to the provisions of § 5.

The Board of Supervisors of Adams County was enjoined by the United States Supreme Court from thereafter holding elections for the offices of county supervisors on a county-at-large basis in *Marsaw* v. *Patterson*, 393 U.S. 544, 89 S.Ct. 817, 22 L.Ed.2d 1 (1969), which was consolidated with *Allen, supra;* however the Supreme Court declined to set aside the November, 1967 elections in Adams County.

The populations of the supervisors' districts in Adams County were so malapportioned prior to November 2, 1970, that in order to hold constitutional elections redistricting was made mandatory under the one-man, one-vote decisions of the United States Supreme Court.[6] The population of districts in Adams County prior to the adoption of the November 2, 1970 redistricting plan varied from 800 residents in District 2 to 16,832 in District 4, based on the 1960 United States Census data, and from

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6. *Baker* v. *Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962); *Gray* v. *Sanders*, 372 U.S. 368, 83 S.Ct. 801, 9 L.Ed.2d 821 (1963); (Georgia's county-unit system); *Reynolds* v. *Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), (Alabama Legislature); *Abate* v. *Mundt*, U.S. Supreme Court # 71, June 7, 1971, (Rockland County, New York Board of Supervisors); *Avery* v. *Midland County*, 390 U.S. 474, 88 S.Ct. 1114, 20 L.Ed.2d 45 (1968), (Midland County, Texas Commissioners' Court); *Martinolich* v. *Dean*, 256 F.Supp. 612 (S.D. Miss., 1966), (Hancock County Board of Supervisors).

1,073 residents in District 2 to 15,074 in District 4, based on the 1970 U.S. Census data.

Therefore, on January 20, 1970 the Adams County Board of Supervisors contracted with Comprehensive Planners, Inc. (CPI) to prepare and submit an acceptable redistricting plan for Adams County. Comprehensive Planners, Inc. is a corporation organized on April 2, 1966 at West Point, Mississippi to, among other things, provide, services to public bodies in the field of political redistricting and reapportionment, and which, since its organization, has prepared and presented redistricting plans for 38 Mississippi counties, 31 of which have been completed. Of these 31, 11 have been the subject of Federal Court litigation and 9 of these have been approved by the Federal Courts without change, while the other two required alterations or modifications in order to conform to more recent population figures not available at the time that they were completed. Never before has one of CPI's county redistricting plans in the State of Mississippi ever been challenged or attacked on the basis of discrimination because of race, color or creed. CPI commenced work on the redistricting plan in question in March of 1970, finally submitting a finalized recommended plan on September 2, 1970 although it had on several occasions prior thereto talked to the Board of Supervisors concerning various aspects of the desired plan and had then submitted one previous draft which was revised and resubmitted as draft No. 2 which was the final plan herein accepted and adopted by the defendants.[7] By Order dated November 2, 1970, after drafting 20 precinct lines and designating polling places, the Board of Supervisors approved the final redistricting plan submitted by CPI and authorized and

7. See Exhibit "B" to Exhibit P-1 (Stipulation of Facts).

directed its submission to the United States Attorney General for his approval pursuant to the Voting Rights Act of 1965, which plan was expressly not objected to.

When the defendants employed CPI to draft an acceptable redistricting plan, they instructed it to equalize as nearly as practicable (1) the population of the districts, (2) the mileage of roads for county maintenance in each of the districts and the square mile areas of the five districts.

Neither the defendants nor anyone else gave CPI's representatives or employees any instructions touching on the racial makeup of any of the districts to be drawn, asked them to consider the racial makeup thereof, nor to in any manner consider any individuals or groups of individuals or areas of the county in the formulation of the proposed new districts. In its drawing of the new district lines CPI did not consider any racial factors or take into consideration the race of any of the citizens of Adams County or the racial makeup of any particular area, but considered only the factors of population, road mileage and area, as instructed.

At the time of commencement of the preparation of the redistricting plan and up until its final submission and adoption, CPI utilized the 1960 United States Census Bureau figures, inasmuch as the 1970 Census figures did not become available to it or to anyone else until February or March of 1971. The adopted and challenged redistricting plan combined the 1960 "house occupancy factor" of both black and white houses with its own house count of all occupied houses in the City of Natchez and Adams County to project the 1960 Census figures to an estimate of the 1970 population of Natchez and Adams County, which was a sound, accepted and approved practice for

the professional count of population for reapportionment purposes. Using the above method, CPI calculated the population of Adams County to be 39,698 as of the time of the submission of its plan, which included a rural population of 19,422, and a population of 20,267 within the city limits of Natchez, the county seat and only incorporated municipality therein, based on the "household factor". This "factor" was 3.3 Whites per house and 3.6 Non-whites per house in the City of Natchez, and 3.8 Whites and 4.6 Non-whites per house in the rural area.

The total racial composition of the supervisors' districts in Adams County after the adoption of the November 2, 1970 redistricting plan, using the 1960 Census data, is as follows:

District No.	White	Non-White	Total	Over or Under Ideal	% Over or Under Ideal
1	4,442 (56.2%)	3,459 (43.8%)	7,901	-39	-0.5%
2	4,708 (60%)	3,139 (40%)	7,847	-92	-1.16%
3	4,267 (52.7%)	3,823 (47.3%)	8,090	+150	+1.89%
4	2,606 (33.2%)	5,255 (66.8%)	7,861	-79	-0.9%
5	4,895 (61.2%)	3,104 (38.8%)	7,999	+59	+0.7%
	20,918 (52.7%)	18,780 (47.3%)	39,698		

The racial and total composition of supervisors' districts in Adams County after the adoption of the November 2, 1970 redistricting plan, using the 1970 Census data, is as follows:

District No.	White	Non-White	Total	Over or Under Ideal	% Over or Under Ideal
1	3,586 (54.6%)	2,976 (45.4%)	6,562	-897	-12%
2	4,466 (60.2%)	2,955 (39.8%)	7,421	-38	-0.5%
3	4,183 (50.9%)	4,031 (49.1%)	8,214	+755	+10%
4	2,288 (33.2%)	4,602 (66.8%)	6,890	-569	-7.6%
5	4,843 (59.0%)	3,363 (41.0%)	8,206	+747	+10%
	19,366 (51.9%)	17,927 (48.1%)	37,293		

It will thus be seen that the ideal population or norm in each supervisor's district subsequent to the adoption of the November 2, 1970 redistricting plan, using the 1960 Census data, would be 7,940. The largest variance from the ideal appears in District 3 where there is a total population variance from the ideal of 150, which is 1.89% higher.

Based upon the 1970 Census figures, which did not become available until February or March, 1971, the population of Adams County was determined to be 37,293. Based upon this total figure, the ideal population, or norm, of each district would be 7,459. The largest variance from the ideal appears in District 1 in which there are 897 people below the norm, or a variance of 12% under the ideal, whereas the populations of Districts 3 and 5 are each 10% above the ideal. The calculated variance of District 4, computed on the basis of the 1970 Census figures is 7.6% below the ideal, a span of 22.15 percentage points. The ratio between the largest and smallest districts is 1.25 to 1 based on the 1970 census figures, whereas under CPI's redistricting plan adopted on November 2, 1970, before the 1970 Census figures were available, the population of each new district was within 2% of the norm, the span ranging from 1.89% above the ideal in District 3 to 0.5% below in District 1.

Comparison of the new districts under the adopted plan and road mileage, using a norm of 66 miles of county roads is as follows: District 1—74.5 miles; District 2—65.0 miles; District 3—74.7 miles; District 4—59.0 miles; District 5—61.5 miles.

The square mile area comparison of the new districts (some of which constituted marshy river areas), with a norm of 20% is as follows: District 1—33.9%; District

2—14.1%; District 3—21%; District 4—20.9%; District 5—10.1%.

The Certificate of A. V. Davis, Circuit Clerk of Adams County,[8] who also testified herein, reflects that pursuant to an order of the defendant Board of Supervisors dated February 16, 1971, that he entered upon the task of transferring all the names of registered voters on the registration rolls of Adams County from Supervisors' Districts existing prior to November 2, 1970 to the new districts, and that the transfer of names was commenced on or about March 10, 1971, through the use of telephone directories, city directories, the knowledge of mail carriers, both within the city and rural, and of members of the Board of Supervisors and based on his own personal knowledge and that of his staff. The actual transfer of the names of registered voters from the old districts to the new was completed on June 4, 1970. Postcards are being addressed to each of the registered voters at their last known addresses advising of the new Supervisor's District, election districts and polling places. Whether a registered voter has been properly transferred will be determined in this manner and the necessary correction on the registration books will then be made. This process was started on June 14, 1971. According to his testimony, no cards were sent to approximately 500 registered voters whose names were purged or eliminated from the poll books when to the knowledge of the election commissioners and himself they were either deceased or had permanently left the county. While he admitted that there was no meeting of the election commissioners authorizing this purge, and thus it was not done according to law, nevertheless to the best of his knowledge, all whose names were purged or removed were Whites.

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8. See Exhibit "P" to the Pre-Trial Order.

Although the defendants had originally ordered a re-registration of all voters in Adams County subsequent to the adoption of the new redistricting plan, based on the request of a group of Blacks, they subsequently revoked this order and did not and do not now require any re-registration.

Adams County, Mississippi has as its western boundary the Mississippi River, and the City of Natchez is the only incorporated municipality therein and is situated on the Mississippi at the approximate center of the western boundary of the county. Former Supervisor's District Nos. 1 and 4 were the only districts whose areas extended into the City of Natchez prior to the redistricting, each of them containing approximately 50% of the municipal population. Supervisor's District 4 has always been the most northerly district in the county, having as its West boundary the Mississippi River and its Northern boundary the North boundary of the county. Since the population concentration of the county is within the city limits of Natchez, it follows that each of the supervisors' districts should logically come into the city in order that the population of the county could be nearly equalized between each of the five districts. Therefore, only the East and Southeast lines of District 4 were required to be changed, and it was essential and inevitable that approximately one-half of the population of District 4 would be assigned to one or more other districts and that this reassigned population would have to come from areas geographically close to the East and Southeast lines of District 4, in which area Black population strongly preponderates, although there were and are other concentrations of Blacks in other areas of the county. Because of the location and boundaries of Adams County and of the City of Natchez, there was very

little maneuvering room in which to meet the exact norm with perfect mathematical exactness.

The Court finds, in accordance with the above Certificate of the Circuit Clerk of Adams County, that based on the new registration books, without possible corrections resulting from the aforementioned method of transfer and without removing any names from the registration books, the following table reflects the number of registered voters by new supervisor's districts and the ratio expressed in percentile that the number of registered voters of each district bear to the total countywide registered voters:

District No. 1	3,625	19.59%
District No. 2	3,803	20.55%
District No. 3	4,310	23.29%
District No. 4	2,859	15.45%
District No. 5	3,909	21.12%
TOTAL	18,506	100.00%

The Court takes judicial notice of the fact that the United States Census is taken every ten years, that the terms of office of supervisors in Mississippi are four years and that elections therefor are held in the Summer and Fall of 1971 and each fourth year thereafter. Under the circumstances peculiar to this case, reliable 1970 Census figures did not become available to the defendants for purposes of redistricting until February or March of 1971, only a few months prior to the designated times for elections. This situation will recur every 20th year counting from 1971. The Census for the year 1980, the results of which will become available in the spring of 1981, will more accurately reflect the population of each of the then supervisors' districts than would any calculated estimate

now available to the parties or the Court and in 1980 the Census will reflect the actual population count of each supervisor's district in Adams County.

Prior to the adoption of the challenged redistricting plan, Supervisor's District 4, which is the principal district in dispute, based on 1960 Census figures, had a total population of 16,832 people, of which 12,053 or 71.6% were Non-white and 4,779 or 28.4% were White; and based on 1970 Census data, District 4 had a total population of 15,074 people, 11,379 or 75.5% of whom were Non-white and 3,695 or 24.5% of whom were White. Under the redistricting plan in question, and based upon the 1960 Census figures, as calculated by CPI, Supervisor's District 4 had a population of 7,861, of whom 5,255 or 66.8% were Non-white and 2,606 or 33.2% are White. The same district, based on 1970 Census data, has a population of 6,890 people, 4,602 or 66.8% of whom are Non-white and 2,288 or 33.2% of whom are White.

Since enactment of the Voting Rights Act in 1965 the registration and election officials of Adams County have denied no person the right to register to vote or the right to vote on account of race or color, and it has never been necessary to request the assistance of Federal Registrars and none have ever been sent into Adams County. The last re-registration in Adams County was conducted in 1956.

Of the total population of Adams County, according to 1970 Census figures, 19,366 are White and 17,927 are Non-white, which results in 51.9% White and 48.1% Non-white (there are only approximately 62 people in Adams County in the "Non-white" category or classification who are not Blacks). Of the total registered voters of Adams County at this time, approximately 11,160 are White and

7,353 are Non-white, or 60.3% Whites and 39.7% Non-whites. Only approximately 50% of the eligible Black voters of Adams County have registered to vote, and the Court finds that the sole reason for this non-registration is lack of interest or complete apathy.

Based on the 1970 Census figures, with the norm of 20% population in each of the five districts, the percentage of population in each of the districts is as follows:

District No. 1	17.6%
District No. 2	19.9%
District No. 3	22.0%
District No. 4	18.5%
District No. 5	22.0%

In computing the population of Adams County for purposes of the redistricting plan, CPI engaged in an actual house count in both the rural areas of Adams County and in the City of Natchez, and as previously stated, had to use different house count factors for white and non-white houses. This was the only reason for distinguishing between them. In arriving at the population figures contained in its plan, CPI had to estimate, and did not actually count each person residing within the county. It reviewed its plan for racial composition in each new district only after the Attorney General of the United States, through the defendants' attorney, requested this information, that is, there had been no determination made or consideration given of racial percentages in the old and new districts before the plan was approved by the Board of Supervisors. It is not, and was not, the policy of CPI to have the percentage of Blacks in each district conform to or reflect the percentage of Blacks in the entire county, but only the factors of population, county road mileage

(exclusive of municipal streets within the corporate limits of Natchez which are maintained by the City) and total square mile area were considered in drawing the new district lines.

Although the expert witness, Harold A. Sweeney, called by the plaintiffs[9] criticized the redistricting plan in question and intimated that it constituted a gerrymander in order to dilute or reduce the number of Black voters in District 4 of Adams County, the Court rejects this contention as well as the contention that the drawing of the new district lines was not difficult or complicated, inasmuch as the expert admitted that he had on several occasions attempted to draw new district lines to redistrict Adams County to avoid any unlawful gerrymandering or malapportionment but had never been able to completely and successfully to do so despite repeated efforts on his part. The plaintiffs offered no plan or proposed plan of their own, and the Court finds that they were unable to do so because of the extreme difficulty resulting from the physical location and boundaries of Adams County and Natchez, the only incorporated municipality therein, which contained over 60% of the total county population.

It is well established that redistricting provisions which change voting districts for the purpose or with the effect of denying Black voters the right to vote in a district where they constitute a majority prior to the redistricting or with the effect of diluting the vote of the Black electorate are violative of the guarantees of the Fourteenth and Fifteenth Amendments. While plaintiffs and the class which they represent have no constitutional right to reside in new districts wherein they maintained a

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9. Exhibit P-6 reflects his qualifications, which are very limited in this field.

population majority prior to the redistricting, they do have a constitutional right not to have their voting strength diluted or minimized as a result of an intentional racial gerrymander by the defendant Board of Supervisors. Likewise, if a racially discriminatory effect is proven then courts may infer a racially discriminatory purpose; and in this regard, neither the state nor a political subdivision thereof may constitutionally munipulate election district boundaries so as to produce an effect which minimizes or dilutes the voting strength of Black voters. *Gomillion* v. *Lightfoot*, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960); *Burns* v. *Richardson*, 384 U.S. 73, 88, 86 S.Ct. 1286, 16 L.Ed.2d 376, 388 (1966); *Fortson* v. *Dorsey*, 379 U.S. 433, 439, 85 S.Ct. 498, 13 L.Ed.2d 401, 405 (1964).

The burden of proving an intentional gerrymandering for the purpose of minimizing or diluting the voting strength of Black voters or of denying them equal protection of the Fourteenth Amendment and the rights secured by the Fifteenth Amendment of the United States Constitution is on the plaintiffs. *Wright* v. *Rockefeller*, 376 U.S. 52, 84 S.Ct. 603, 11 L.Ed.2d 512 (1964). This Court finds as a matter of fact and concludes as a matter of law that plaintiffs have failed to meet this burden of proving that the new district lines were drawn by or for the defendants on racial lines or that the defendants or CPI were motivated by considerations of race, creed or country of origin in creating the new districts. Certainly, Adams County not only had the right, but also the duty, to redistrict because of the extremely malapportioned supervisors' districts that existed. *Avery* v. *Midland County*, 390 U.S. 474, 88 S.Ct. 1114, 20 L.Ed.2d 45 (1968); *Martinolich* v. *Dean*, 256 F.Supp. 612 (S.D. Miss., 1966). The facts of this case establish that there was no gerrymandering to dilute Black voting strength in District 4, but

on the contrary, it was necessary to redistrict Adams County as it was done because of the irregular shape thereof and the fact that its western boundary was the Mississippi River with the City of Natchez being located on the Mississippi, thus requiring all districts to include part of this heavily populated municipality. The Court further finds that subsequent to the challenged redistricting plan and based upon 1970 Census data, the population of District 4 is still 66.8% Non-white and only 33.2% White; the population of District 3 is 49.1% Non-white and 50.9% White; the population of District 1 is 45.4% Non-white and 54.6% White; the population of District 5 is 41% Non-white and 59% White and the population of District 2 is 39.8% Non-white and 60.2% White. The overall population of Adams County is 17,927 or 48.1 Non-whites and 19,366 or 51.9% Whites. The Court thus finds that the plaintiffs have failed upon the facts and law to establish any gerrymandering to dilute the black voting strength in District 4 or any other district of Adams County; that the effect of the redistricting plan left a Black majority in District 4 and almost equalized it with the White population in District 3. In view of these findings and the absence in the record of any substantial competent evidence by the plaintiffs to meet their burden of proof that qualified Blacks were not freely and lawfully permitted to register or vote since 1965, this Court finds that the allegations of Count II are without basis in fact or in law; that they have thus failed to establish any violation of their constitutional rights inasmuch as they have failed to meet their burden of proving the new redistricting plan, including the new district boundaries, had as its purpose or effect unlawful gerrymandering or invidious discrimination motivated by or because of race, color or creed. *Wright* v. *Rockefeller, supra.* This Court finds that the adopted and challenged redistricting passes constitutional

muster in this regard within the framework of *Connor* v. *Johnson*, 279 F.Supp. 619, *affd. per curiam*, 386 U.S. 483, 87 S.Ct. 1174, 18 L.Ed.2d 224 (1966), in which the contention most fervently pressed was that Blacks would be denied a fair opportunity to elect Black candidates to the United States House of Representatives in view of legislative reapportionment of Congressional Districts in Mississippi. The Court in *Connor stated*:

> "We are of the view that the adjudication of this controversy is controlled by Wesberry v. Sanders, 376 U.S. 1, 84 S.Ct. 526, 11 L.Ed.2d 481." 279 F.Supp. 622.
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> "It has thrice been held by three judge district courts, applying Wesberry, that one factor, and only one, may be taken into account in apportioning and establishing Congressional districts among the people of a state and that factor is population."

In *Chavis* v. *Whitcomb*, 305 F.Supp. 1364 (S.D. Ind. 1969), *revd.* in *Whitcomb* v. *Chavis*, U.S. Supreme Court No. 92, decided June 7, 1971, the Supreme Court held that a minority race was not necessarily entitled to elect any certain number of representatives, and the plaintiffs had failed to meet their burden of proving that the multi-member district complained of resulted in invidious discrimination because of race, color or creed. In *Whitcomb*, *supra*, the Supreme Court stated:

> "The District Court's holding, although on the facts of this case limited to guaranteeing one racial group representation, is not easily contained. It is expressive of the more general proposition that any group with distinctive interests must be represented in legislative halls if it is numerous enough to command at

> least one seat and represents a majority living in an area sufficiently compact to constitute a single-member district.[34] This approach would make it difficult to reject claims of Democrats, Republicans, or members of any political organization in Marion County who live in what would be safe districts in a single-member district system but who in one year or another, or year after year, are submerged in a one-sided multi-member district vote.[35] There are also union oriented workers, the university community, religious or ethnic groups occupying identifiable areas of our heterogeneous cities and urban areas. Indeed, it would be difficult for a great many, if not most, multi-member districts to survive analysis under the District Court's view unless combined with some voting arrangement such as proportional representation or cumulative voting aimed at providing representation for minority parties or interests.[36] At the very least, affirmance of the District Court would spawn endless litigation concerning the multi-member district systems now widely employed in this country.[37]"

In footnote 34 in *Whitcomb*, the Court made the following observation:

> "Interestingly enough, in Wright v. Rockefeller, 376 U.S. 52 (1964), challenge was to a single-member district plan with districts allegedly drawn on racial lines and designed to limit Negroes to voting for their own candidates and save Negro districts. We rejected the challenge for failure of proof, but noted in passing that '. . . some of these voters . . . would prefer more even distribution of minority groups among the four congressional districts, but others, like the intervenors in this case, would argue strenuously that the kind of districts for which appellants contended

would be undesirable and, because based on race or place of origin, would themselves be unconstitutional.' 376 U.S. at 57-58."

In summary, this Court finds that the defendants, acting through CPI, redistricted Adams County in an attempt to comply with the one-man, one-vote rule and did so with an eye that was color-blind, with no intent to gerrymander or deprive plaintiffs or the class that they represent (Blacks and other Non-whites) of any of their constitutional rights guaranteed by the Fourteenth or Fifteenth Amendment or any laws of the United States nor for the purpose of reducing the Black majority in District 4 or diluting the voting strength of Blacks therein or any other district of Adams County; that this was the exercise of a discretionary and required function of the Board of Supervisors under the circumstances existing, and was done without regard to race, color or creed, but solely for the purpose of, and with the desire to, meet the constitutional requirements of the one-man, one-vote requirement because of the extremely malapportioned districts which existed in Adams County; this redistricting did not reduce the majority population of Blacks in District 4 nor did it reduce the ratio of Black voters below a majority therein; that it increased the percentage of Black population in at least one other district to a percentage over and above the countywide percentage of Blacks to Whites and provided for a substantial percentage of Blacks in each of the other districts of Adams County; that the plaintiffs have not met the burden of proving that all Black voters vote for only Black candidates and all White voters vote for only a White candidate but even if this were true, neither the intent nor the effect of the complained of redistricting violated any constitutional right of the plaintiffs or the class which they represent and was

not drawn on racial lines and was not motivated by considerations of race, creed or country of origin in thus creating the new districts. *Gomillion, supra*, is not apposite here because the facts therein, namely an effort to take all but four or five of 400 Negro citizens out of a municipality while not removing a single White voter, are certainly distinguishable from the facts of this case and thus the plaintiffs' reliance thereon is misplaced, particularly in view of the very recent Supreme Court opinion in *Whitcomb, supra*.

As previously mentioned herein, the plaintiffs at the eleventh hour filed their "Amended Motion to Amend Complaint" to add an additional Count, Count III, to their Complaint (Paragraphs 23-26) in order to allege on behalf of themselves and all other registered voters of Adams County that the November 2, 1970 redistricting resulted in malapportioned supervisors' districts, and thus denied to plaintiffs and their class rights secured by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983. In this proposed Amendment to the Complaint, the plaintiffs prayed that this Court issue an injunction enjoining the defendants and all persons in active concert or participation with them from holding or causing to be held primary and general elections for members of the Adams County Board of Supervisors under the November 2, 1970 redistricting plan as described above and enjoin the defendants to submit to the Court within two weeks a plan for the apportionment of population among each of the five supervisors' districts of Adams County which is based upon 1970 Census data "which is free of racial discrimination or gerrymandering, and which conforms to the requirements of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution" and

that they be granted further relief, including their costs of this litigation, necessary expenses hereof, and reasonable attorneys' fees, all of which they seek in their prayer under Count II.

This "Amended Motion to Amend the Complaint" was first called up at the trial of this case on June 22, 1971 five days after it was filed, at which time the defendants objected thereto on the ground that it was not timely filed and that it injected questions of fact and law not contained directly or by inference in the original Complaint. This Court reserved ruling on the objection and permitted both sides to offer evidence on this question of malapportionment during the trial which was concluded on July 23, 1971.

As previously stated, the 1970 Census figures for Adams County, Mississippi became available to the parties in late February or early March of 1971, approximately two months prior to the filing of the original Complaint herein on May 5, 1971. The defendants filed their Answer on May 14, 1971, the plaintiffs and defendants requested an expeditious hearing of this matter which the Court granted by holding a pre-trial conference on June 7, 1971, and tried this case on June 22 and 23, 1971. This Court required an approved pre-trial order to be submitted on or before June 16, 1971, and plaintiffs' request for an extension of time to present this Order to June 17, 1971 was granted. On that date, five days prior to the trial date, the plaintiffs filed and served this "Amended Motion" which was called up for the first time during the trial.

All parties were aware that primary elections are to be held in accordance with the law of the State of Mississippi on August 3, 1971. The parties were instructed

to submit their proposed Findings of Fact and Conclusions of Law to this Court as well as their briefs in suppport of and in opposition to this Amended Motion to Amend the Complaint no later than July 14, 1971, on which date the plaintiffs complied, the defendants having done so approximately two days previously.

Although this Court, based upon the foregoing sequence of events, was inclined to sustain the objection of the defendants to the Amended Motion to Amend by adding Count III, nevertheless, within its sound discretion, based on Rule 15(a), Federal Rules of Civil Procedure, which provides that parties may amend their pleadings after responsive pleadings have been filed, with leave of the Court "and leave shall be freely given when justice so requires," and on the cases and treatises which indicate that this provision should be and has been liberally construed[10] especially in the absence of prejudice to the opposite party by the Amendment or its timing,[11] and in order to adjudicate all issues concerning the redistricting of Adams County, does hereby overrule the objection to the amendment and permits the plaintiffs to Amend their Complaint by adding Count III thereto. Thus, this Court will consider and now discuss all of the evidence offered by the parties in connection with this allegation of malapportionment as well as the applicable authorities which have dealt with this "one-man, one-vote" constitutional requirement.

After determining that federal courts have jurisdiction to consider inequalities in the apportionment of election districts for the election of state legislators, *Baker* v.

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10. *Forman* v. *Davis*, 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962); 3 Moore, Federal Practice, Paragraphs 15.08 and 15.10 (2nd Ed. 1948).

11. *Roberts* v. *Williams*, No. 28829 (C.A. 5, April 1, 1970).

Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), the United States Supreme Court announced its one-man, one-vote principle in *Reynolds* v. *Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), and in five companion cases decided at the same time. In *Reynolds* the Court held:

> ". . . the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable." 377 U.S. 533, 577.

In two other cases, *Swann* v. *Adams*, 385 U.S. 440, 87 S.Ct. 569, 17 L.Ed.2d 501 (1967) and *Kilgarlin* v. *Hill*, 386 U.S. 120, 87 S.Ct. 820, 17 L.Ed.2d 771 (1967), the Court disapproved legislative apportionment plans with variances of over 10%. In *Kilgarlin*, the span was from 14.84% above to 11.64% below the norm, with a ratio of the largest to the smallest of 1.31 to 1. It was noted that after reconstruction of floterial districts, the ratio would be 1.21 to 1, a questionable variation.

In *Kirkpatrick* v. *Preisler*, 394 U.S. 526, 89 S.Ct. 1225, 22 L.Ed.2d 519 (1969), the Court held that Article I, § 2 of the Constitution requires that states create congressional districts which provide equal representation for equal numbers of people with "only the limited population variances which are unavoidable despite a good faith effort to achieve absolute equality, or for which justification is shown," and further held that the variances between Missouri congressional districts which varied from the ideal, based on 1960 Census figures, by 2.84% below to 3.13% above the ideal was contrary to the constitutional requirement of equal representation.

The latest Supreme Court pronouncement in this field is found in the case of *Whitcomb* v. *Chavis*, *supra*, in which

the Supreme Court upheld the Indiana Three-Judge District Court's ordering of statewide reapportionment because evidence, based on 1960 Census figures, showed that one Senate district was overrepresented by 13.68% while another was underrepresented by 14.52% for a total variance of 28.20%, and thus a ratio between the largest and smallest districts of 1.327 to 1; that the House figure variance from one representative district to another was 24.78%, with a ratio of 1.279 to 1. The Court stated that these variations were in excess of, or very nearly equal to, the variation of 25.65% and a ratio of 1.30 to 1 which was held to be excessive for state legislatures in *Swann* v. *Adams,* 385 U.S. 440 (1967), pointing out that in *Kirkpatrick* v. *Preisler, supra,* and *Wells* v. *Rockefeller,* 394 U.S. 542 (1969) variances of 5.97% and 13.096%, respectively, were impermissible for congressional redistricting.

In *Avery* v. *Midland County,* 390 U.S. 474, 88 S.Ct. 1114, 20 L.Ed.2d 45 (1968), the Supreme Court applied the one-man, one-vote rule of *Reynolds* v. *Sims, supra,* to units of local government and rejected the argument that the Commissioner's Court of Midland County, which is equivalent to the Adams County Board of Supervisors, could be elected from districts that sought goals other than equal population. The Court held that local units with general governmental powers over an entire geographic area may not, consistently with the Equal Protection Clause of the Fourteenth Amendment, be apportioned among several-number districts of substantially unequal population, and that the Equal Protection Clause reaches the exercise of state power, however manifested, whether exercised directly or through subdivisions of the state which have the same or similar powers as that exercised by Boards of Supervisors in the State of Mississippi, which are the county governing bodies of the State.

In *Abate* v. *Mundt*, ... S.Ct. ..... (No. 71, June 7, 1971), a country redistricting case, the U. S. Supreme Court on the same date that it decided *Whitcomb, supra,* held that electoral apportionment must be based on the general principle of population equality and that this principle applies to state and local elections (citing *Avery* v. *Midland County, supra*). The Court went on to state that "mathematical exactness or precision is hardly a workable constitutional requirement" (citing *Reynolds* v. *Sims, supra*), but deviations from population equality must be justified by legitimate state considerations (citing *Swann* v. *Adams, supra*). In *Abate,* the Supreme Court stated:

> "In assessing the constitutionality of various apportionment plans, we have observed that viable local governments may need considerable flexibility in municipal arrangements if they are to meet changing societal needs, Sailors v. Kent Board of Education, 387 U.S. 105, 110-111 (1967), and that a desire to preserve the integrity of political subdivisions may justify an apportionment plan which departs from numerical equality. Reynolds v. Sims, 377 U.S. 533, 578 (1964). These observations, along with the facts that local legislative bodies frequently have fewer representatives than do their state and national counterparts and that some local legislative districts may have a much smaller population than do congressional and state legislative districts, lend support to the argument that slightly greater percentage deviations may be tolerable for local government apportionment schemes, cf. Reynolds v. Sims, supra, at 578. Of course, this Court has never suggested that certain geographic areas or political interests are entitled to disproportionate representation. Rather our

statements have reflected the view that the particular circumstances and needs of a local community as a whole may sometimes justify departures from strict equality.

". . . In this case, we have no such indigenous bias; there is no suggestion that the Rockland County plan was designed to favor particular groups. It is true that the existence of any deviations from strict equality means that certain districts are advantaged at that point in time; but, under this plan, changing demographic patterns may shift electoral advantages from one town to another.

"The mere absence of a built in bias is not, of course, justification for a departure from population equality . . ."

"We emphasize that our decision is based on the long tradition of overlapping function and dual personnel in Rockland County government and on the fact that the plan before us does not contain a built in bias tending to favor particular political interests or geographic areas. And nothing we say today should be taken to imply that even these factors could justify substantially greater deviations from population equality. But we are not prepared to hold that Rockland County reapportionment plan violates the Constitution, and, therefore, we affirm."

In *Abate, supra,* the facts reveal that for more than a century the Rockland County Board of Supervisors consisted of the supervisors of the county's five towns, resulting in extensive functional interrelationships and intergovernmental coordination between county and towns. Severe malapportionment due to population growth led to court-reapportionment. The proposed plan, challenged

by the petitioners, provided for a county legislature of 18 members chosen from five districts, corresponding with the towns, each district being assigned legislators in the proportion of its population to that of the smallest town. The plan produced a total deviation from equality of 11.9%, that is, one district was 7.1% below the norm while another was 4.8% above.

In the case sub judice, the challenged redistricting plan of Adams County adopted by the defendants on November 2, 1970 which was based upon 1960 Census figures, inasmuch as 1970 Census figures were not available at that time, evidenced a variation or range from 1.89% in District 3 above the norm to 1.16% in District 2 below the norm and would have complied with the constitutional requirement.

However, based upon 1970 Census data, the percentage in District 1 is 12.03% below the norm or ideal and in District 3 is 10.12% above, or a span or difference of 22.15% percentage points, with the ratio between the largest and smallest districts being 1.252 to 1. In addition, District 5 is 10.01% above the ideal and District 4 is 7.63% below, with District 2 being 0.51% below.

Even under the more liberal test of *Abate* v. *Mundt*, which tolerates slightly greater percentage deviation for local government apportionment schemes, namely 11.9% from equality under the particular circumstances of that case, the 22.15% deviation from equality present herein, based on the 1970 Census data, does not in this Court's opinion pass constitutional muster under the one-man, one-vote equal protection provision of the Fourteenth Amendment to the United States Constitution. This is particularly true in view of the fact that the Court in *Abate* emphasized that its decision was based on the long

condition of overlapping function and dual personnel in Rockland County government and further stated that ". . . nothing we say today should be taken to imply that even these factors could justify substantially greater deviations from population equality . . ."

Nevertheless, this Court will deny the plaintiffs' prayer for a temporary and permanent injunction to stay or delay the 1971 primary and general elections in Adams County pending a submission of a new or modified plan to comply with the one-man, one-vote rule for the same reasons that the United States Court of Appeals for the Fifth Circuit affirmed the denial of by the United States District Court for the Northern District of Mississippi of a preliminary injunction prayed for in *Mississippi Freedom Democratic Party* v. *Democratic Party*, 362 F.2d 60 (1966), and because of additional reasons. This Court finds: (1) that in June, 1965 the State of Mississippi abolished all its registration requirements other than that the applicant be of the age of majority, have two years' residence in the State and be able to read and write,[12] the voters of Mississippi ratified the necessary constitutional changes on August 17, 1965, and the Attorney General of Mississippi instructed county registrars to use a simple short registration form; (2) the record fails to show any substantial evidence of acts of intimidation or coercion designed to inhibit Blacks from registering in Adams County since 1965, but on the contrary, this Court finds that there has never been any intimidation, threats or economic reprisals against Blacks to prevent their registering or voting in Adams County since 1965; (3) a re-registration requirement originally ordered by the Board of Supervisors of

12. See 1965 Amendments to Mississippi Constitution, §§ 244, 241(a) and revisions of Mississippi Code, §§ 3209.6, et seq., and repealed § 3212.7.

Adams County was revoked; (4) the Adams County Board of Supervisors through the agency it employed to produce a workable and constitutional redistricting plan did so based upon the latest available Census figures (the 1960 Census data) at the time of the adoption thereof, November 2, 1970, and this plan was completed prior to availability of 1970 Census figures which did result in a wider variation of population between districts; (5) the redistricting of Adams County was accomplished without the purpose or effect of overturning a Black majority in District 4 or in unconstitutionally diluting the Black vote in that district or in any other district, including District 4 or any other district of Adams County; (6) none of the new districts contains any element or segment of the population to the exclusion of or different from any other district, that is, each district includes residents of the rural area of Adams County as well as those residing within the incorporated City of Natchez; (7) although 1970 Census data was available to the plaintiffs since February or March 1971 they nevertheless did not file their suit herein until May 5, 1971, and did not attempt to inject the question of malapportionment until June 17, 1971, just five days prior to the hearing of this matter; furthermore, the Amended Motion to Amend to add Count III to the Complaint was first called up during the trial of this matter on June 22, 1971, the plaintiffs then well knowing that first primary elections were to be held under Mississippi law on August 3, 1971, with less than 30 days remaining from the time set by the Court at the request of the parties for the post trial submission of Proposed Findings of Fact and Conclusions of Law before the primary election date. Equity does not assist those who slumber on their rights; (8) The defendants have adopted the most expeditious method of implementation of the plan with no re-registration requirement but the names of registered voters were transferred from

the old to the new district poll books, beginning on March 10, 1971, seven days after the Attorney General of the United States voiced no objection to the implementation of the redistricting plan in question, and this procedure was still incomplete and in progress at the time of the trial of this case at which time the promulgation of information to registered voters of changes in districts, precincts and polling places still remained incomplete; (9) the first primary election is just around the corner and it would be no small disruption to Adams County or to a political party or to the public when an election is postponed or stayed at the last moment inasmuch as all ballots would have been printed and paid for, ballot boxes and all precincts in Adams County would have been prepared with the names of registered voters transferred in accordance with the redistricting plan, and election managers (commissioner, watchers) for the precincts would have been appointed. As Judge Wisdom pointed out in *Mississippi Freedom Democratic Party, supra,* "Everyone knows that as a political campaign draws to an end, the tempo increases. The candidates' expenses increase. Political intrusions on the public, by television, radio, and sound-truck, increase. At this late date, to postpone the election until September is to subject the candidates and the public to an unbargained for, expensive and exacerbating extension of the current campaign," (10) Complete confusion would result from an attempt, at this late date, to reform district lines and to perform the repetition of the necessary incidental or other ministerial acts, which latter would include the dissemination of new districts, precincts and polling place information to voters for the second time in less than four months; (11) the effort to redraw the district lines would require and result in the splitting of the 1970 Census Enumeration Districts and the calculation or estimate of

the population of each part, which even plaintiffs confess would be unavoidable; (12) the plaintiffs were requested to, but offered, no alternate plan; (13) More or less minor problems include the fact that candidates have qualified since June 4, 1971, according to the present beat lines; new lines could affect their residency qualifications; and there would be difficulty in getting absentee ballots to servicemen and their return before the election.

Weighing competing values and balancing the inconveniences, in view of the foregoing facts and circumstances, the plaintiffs' prayer for a preliminary or permanent injunction to stay or delay the holding of the primary and general elections in Adams County for the year 1971 will be denied. See *Connor* v. *Johnson*, ... S.Ct. ..... (June 4, 1971).

This Court has given some thought to requiring a countywide primary and general election in Adams County for 1971. The plaintiffs contend that this Court would be powerless to do so without first complying with Section 5 of the Voting Rights Act, but apparently they are not aware of *Sheffield* v. *Itawamba County, et al*, ____ F.2d ____ (Slip Opinion No. 30452, C.A. 5, Feb. 19, 1971), which established that a United States District Judge, as a Federal Chancellor, may formulate a reapportionment plan or order a countywide election without the approval of the Attorney General of the United States or the United States District Court for the District of Columbia, pursuant to § 5 of the Voting Rights Act of 1965. However, this Court feels that it would be more equitable and practicable to permit the primary and general elections to proceed district wide in Adams County in 1971. Also see *Connor* v. *Johnson, supra.*

Nevertheless, the defendants herein shall on or before December 1, 1971, present a constitutionally acceptable revised or modified redistricting plan, based on the 1970 Census figures, which complies with the one-man, one-vote requirement of the Equal Protection Clause of the Fourteenth Amendment.

The plaintiffs in Counts II and III of their Complaint have requested that the defendants be required to pay their attorneys' fees. Although the allowance of attorneys' fees is normally predicated upon contract or statutory authorization, this Court, sitting as a Court of equity, does have the inherent power to award attorneys' fees where the circumstances warrant. *Kemp* v. *Beasley*, 352 F.2d 14, 23 (C.A. 8, 1965); *Smoot* v. *Fox*, 353 F.2d 830, 832 (C.A. 6, 1965). In the exercise of this equitable discretion in civil rights cases, courts have generally denied the extraordinary relief of awarding attorneys' fees absent a finding of "unreasonable, obdurate obstinacy" on the part of the defendants. See *Bradley* v. *School Board of City of Richmond*, 345 F.2d 310, 321 (C.A. 4, 1965); *Kemp* v. *Beasley, supra*; *Williams* v. *Kimbrough*, 295 F.Supp. 378, 387, *affd.* 415 F.2d 875 (C.A. 5, 1969), *cert. den.* 396 U.S. 1061 (1970).

In the case sub judice, there is no proof in the record to indicate that the defendants ever acted in bad faith or with unreasonable, obdurate obstinacy, but rather were compelled to redistrict because of the severe malapportionment of their districts and their legal inability to conduct countywide elections. They in good faith employed a competent firm of planners who specialized in redistricting, and neither this firm nor the defendants submitted nor approved, respectively, any plan drawn with any racial considerations in mind, that is, for the purpose or ef-

fect of reducing the strength of Black voters in Supervisor's District 4 or diluting their voting strength therein or any other district in Adams County, and were therefore guilty of no unconstitutional gerrymandering. Furthermore, the redistricting plan drawn and approved on November 2, 1970 did comply with the one-man, one-vote requirement of the Equal Protection Clause of the Fourteenth Amendment based upon the available 1960 Census data, but only later did it develop that the 1970 Census data resulted in an unconstitutional malapportionment which was never challenged until immediately before the trial of this case. Under the circumstances of this case, this Court is therefore of the opinion and finds that the conduct of the defendants was not malicious, oppressive, or so "unreasonably and obdurately obstinate" as to warrant an award of attorneys' fees under either Counts II or III of the Complaint. Plaintiffs however are entitled to an award for their necessary costs and expenses of filing and prosecuting this action, and they are hereby required to file an Affidavit of Costs herein within 10 days with a copy to be sent to the defendants who will have five days thereafter to challenge said Cost Affidavit if they desire to do so.

A Judgment or Decree conforming with the foregoing Opinion which constitutes this Court's Findings of Fact and Conclusions of Law required by the Federal Rules of Civil Procedure, shall be presented to this Court, approved as to form by attorneys for both sides, within five days after this date, pursuant to the Rules of this Court.

/s/ Walter L. Nixon, Jr.
United States District Judge

Biloxi, Mississippi
July 20th, 1971

APPENDIX 2

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-2361

REVEREND LEON HOWARD and BARNEY SCHOBY,
Individually and on behalf of all others
similarly situated,
Plaintiffs-Appellants,

versus

ADAMS COUNTY BOARD OF SUPERVISORS, ROBERT E. (BOB) BEE, BOYD SOJOURNER, JAMES H. CARTER, IKE FOSTER AND ELMORE REE, as members of the Adams County Board of Supervisors,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Mississippi

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(Filed July 29, 1971)

Before GEWIN, COLEMAN and GOLDBERG, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellants' motion for an injunction pending appeal and their alternative motion for an expedited hearing filed in the above styled and numbered cause are hereby DENIED.

IT IS FURTHER ORDERED that the district court's order contained in its memorandum opinion dated July 20,

1971 shall remain in full force and effect subject only to the provisions herein contained.

IT IS FURTHER ORDERED, however, that upon the filing of the redistricting plan for supervisors' districts on or before December 1, 1971, as directed by the district court in its opinion of July 20, 1971, the district court shall expeditiously proceed to hear, determine, and pass upon the merits of such a plan, and if any plan presented is not a meritorious plan, then the district court, with the best information available, shall devise one.

IT IS FURTHER ORDERED that upon the approval of a legally sufficient plan by the district court, and, in any event, not later than May 16, 1972, the district court shall order that a final election be held under the laws of the State of Mississippi in the five (5) respective districts (beats) of Adams County for the selection of a board of supervisors in compliance with the one-man, one-vote mandate of the United States Constitution. Those supervisors elected pursuant to the terms of this order shall assume and hold the offices to which they are elected within thirty (30) days after such election.

IT IS FURTHER ORDERED that the district court shall retain jurisdiction of this cause subject only to the provisions hereof.

We further note, however, that in the absence of the record we do not pass upon appellants' contention that the redistricting of Adams County "was racially motivated and enacted for the purpose and effect of diluting the voting strength of black voters of Adams County, particularly those residing in old District 4, and of preventing the election of black candidates for office in Adams County." This contention will be considered when the case is finally submitted to this court for hearing on the merits.

The mandate shall issue forthwith.

APPENDIX 3

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 71-2361

REVEREND LEON HOWARD and BARNEY SCHOBY,
Individually and on behalf of all others
similarly situated,
Plaintiffs-Appellants,

-vs-

ADAMS COUNTY BOARD OF SUPERVISORS, ROBERT E. (BOB) BEE, BOYD SOJOURNER, JAMES H. CARTER, IKE FOSTER, and ELMORE REE, as members of the Adams County Board of Supervisors,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Mississippi

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(Filed August 25, 1971)

Before GEWIN, COLEMAN, and GOLDBERG, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellees' motion to dismiss the appeal, filed in the above styled and numbered cause is hereby DENIED for the reason that the relief granted in the order of July 29, 1971, was in aid of the appellate jurisdiction of this Court and should remain in effect pending the disposition of the appeal on the merits, which will follow in due course.

APPENDIX 4

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-2361
Summary Calendar*

REVEREND LEON HOWARD and BARNEY SCHOBY, Individually and on behalf of all others similarly situated,
Plaintiffs-Appellants Cross Appellees,

versus

ADAMS COUNTY BOARD OF SUPERVISORS, ROBERT E. (BOB) BEE, BOYD SOJOURNER, JAMES H. CARTER, IKE FOSTER AND ELMORE REE, as members of the Adams County Board of Supervisors,
Defendants-Appellees Cross Appellants.

Appeals from the United States District Court for the Southern District of Mississippi

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(January 6, 1972)

Before GEWIN, GOLDBERG and DYER,
Circuit Judges.

DYER, Circuit Judge: Howard and Schoby, black citizens of Adams County, Mississippi, filed a class action attacking a county-wide redistricting plan adopted by and for the election of the Adams County Board of Supervisors. The focus of this appeal is the district court's de-

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*Rule 18, 5 Cir.; See Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir. 1970, 431 F.2d 409, Part I.

nial of relief of plaintiffs' claim that the new plan is constitutionally impermissible as a racially motivated gerrymander, operating to dilute the voting strength of the blacks of Adams County. We affirm.[1]

Adams County is the southwestern-most county in Mississippi, having as its western boundary the Mississippi River. The only incorporated municipality in the county is the City of Natchez, situated on the river at the approximate center of the western boundary of the county. The total population of the county in 1960 was 37,730, the City of Natchez consisting of 23,791 or 64% of the total population. The ratio of blacks to whites in the county is roughly one to one, 48% black—52% white. The black population of the county is heavily concentrated in the City of Natchez, with the concentration extending into the rural areas that border northwestern Natchez and comprise the northwestern corner of the county.

As late as 1970, the Board of Supervisors, the county's legislative body, was elected from five electoral districts which varied in population from 800 to 16,832. These districts were patently malapportioned. Redistricting was essential to a constitutionally valid election in November of 1970 under the one-man, one-vote mandate of *Reynolds v. Sims*, 1964, 377 U.S. 533. Accordingly, in January of 1970 the Board of Supervisors retained Comprehensive Planners, Inc. (CPI) to prepare a redistricting plan. The resulting plan was adopted by the Board on November 2 of

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1. The district court in this case found that the population of the new districts deviated in equality to such an extent that they are unconstitutional under *Abate v. Mundt*, 1971, 403 U.S. 182, and ordered the Board to present a constitutionally acceptable modification to the plan by December 1, 1971, in order to comply with the one-man, one-vote requirement. This Court, in denying a motion by plaintiffs for an injunction pending appeal, ordered the Board, upon approval of a plan by the district court, or not later than May 16, 1972, to hold final elections for the Board under a constitutionally acceptable plan. These orders are, of course, not at issue in this appeal.

that year. The Board submitted the plan to the Attorney General of the United States for his approval pursuant to § 5 of the Voting Rights Act of 1964, 42 U.S.C.A. § 1973(c). No objection was interposed.

Equality of population in electoral districts was a primary goal of the revision. Another objective, however, was the equalization of the responsibilities of each Supervisor in exercising their traditional function of highway and bridge maintenance. Thus, the Board instructed CPI not only to equate, as best it could, the population of the districts, but also the mileage of roads for county maintenance, and the square mile area of each district. With its land area largely rural, and its population concentrated in one urban area, the realization of these legitimate planning objectives dictated a plan which would consolidate urban and rural areas into each district. As the new plan was developed, therefore, each district converged in spoke-like fashion from a broad rural base into the City of Natchez. This dissection of the population concentration of the county resulted in an equal allocation of the population of Natchez among the new districts. Under the population figures available to CPI in 1970, prior to the publication of the 1970 census, the result was a plan in which substantial equality of population was reached in districts that reflected cross sections of urban and rural land areas.

The allocation of the population concentration of the city resulted in the removal of some 7000 blacks from old Supervisor District Four, where prior to the implementation of the plan 60% of the blacks in the county lived and commanded a 75% population majority. These blacks, now residing in new districts other than Four, found themselves in electoral districts where blacks no longer represented a majority of the population. The reallocation of the population of Natchez, on the other hand,

substantially balanced the racial ratio of the population in new Districts Three, 51% white, 49% black, and One, 55% white, 45% black, and resulted in a significant amelioration of the racial population disparities in the other two districts, although whites there continued to constitute a 60%-40% population majority.

Plaintiffs object to the CPI plan as a racially motivated gerrymander, contending that as a result of the shift of a part of the highly concentrated black population of the county, the voting strength of blacks as a legally cognizable racial element was unconstitutionally diluted and the effectiveness of their franchise correspondingly reduced. Their claim is essentially based upon the Equal Protection Clause of the Fourteenth Amendment. Specifically, plaintiffs argue that this dilution is represented by the difference in effective voting power blacks now command in Adams County, under the new plan, and the effective voting power blacks could command if the revision had been drawn to recognize their population segment of northwestern Adams County as numerically large enough, and geographically contiguous enough, to constitute two electoral districts in which blacks would retain a significant population majority. Further, as a side effect of the plan, it is urged that these blacks, Howard and Schoby included, who formerly were part of the majority class in old District Four, and now are a minority class in each of the new electoral districts, have suffered a more serious dilution of their voting power since they are "denied the right to vote in a district where they constituted a majority prior to the redistricting" and could "elect black candidates if they so chose."

A long line of cases beginning with *Grey v. Sanders*, 1963, 372 U.S. 368, and *Reynolds v. Sims, supra*, teaches that each citizen must have an equally effective voice in the election of his legislative representative by requiring

substantial equality of population in electoral districts. Malapportionment, however, is not the only evil which this effectiveness guarantee is designed to combat. It is also aimed at the gerrymander. It is the gerrymander, not malapportionment, that is at issue in this appeal.

The gerrymander is as great a threat to equality of representation as malapportionment. While malapportionment generally emphasizes considerations of the weight of an individual's vote, a gerrymandering operates to destroy the effectiveness of the franchise by diluting the vote of recognizable racial, ethnic, or political groups in order to benefit a favored interest.

As we view the constitutional requirements in this area, to establish the existence of a constitutionally impermissible redistricting plan, in the absence of malapportionment, plaintiffs must maintain the burden of proving (1) a racially motivated gerrymander, or a plan drawn along racial lines, *Wright v. Rockefeller*, 1964, 376 U.S. 52; *Gomillion v. Lightfoot*, 1960, 364 U.S. 339; *Sims v. Baggett*, M.D. Ala. 1965, 247 F. Supp. 96, *or* (2) that ". . . designedly or otherwise, a[n] . . . apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population." *Burns v. Richardson*, 1966, 384 U.S. 73, 88. *See Whitcomb v. Chavis*, 1971, 403 U.S. 124, 143-144, 149.[2]

First, a careful consideration of the record leaves us in complete agreement with the finding of the district

2. While the "dilution" test developed in *Burns*, and expanded in *Whitcomb*, is used in those cases to test the constitutionality of multi-member district plans, we have no hesitation in applying that test as a measure of the constitutionality of reapportionment plans involving only single-member districts. In each instance, we are required to determine the same question, whether or not there has been an unconstitutional manipulation of electoral district boundaries so as to minimize or dilute the voting strength of a minority class or interest.

court that plaintiffs failed to sustain their burden of proving that the CPI plan was the product of a racial motivation or purpose. *See Wright v. Rockefeller, supra,* 376 U.S. at 56. The record is bare of such evidence. The district court was correct in holding that CPI did not consider, nor were they instructed to consider, the racial makeup of the districts to be drawn.

Plaintiffs more forcefully urge that the new plan has resulted in an impermissible dilution of the voting strength of their class in violation of the rule established in *Burns, supra.* But following the change of district boundaries, blacks in District Four continue to enjoy a 67% population majority. Blacks in District Three command the same population percentage as do whites, and a population percentage greater than the percentage of population they represent county-wide. In District One, whites outnumber blacks by only 10%, 55% to 45%, and blacks again constitute about the same population ratio as they do county-wide. In Districts Two and Five blacks continue to remain in the minority, representing 40% of the population in each district. The obvious reason for this disparity is their continued enjoyment of a heavy population majority in District Four.

These considerations lead us to approve the finding of the district court that plaintiffs failed to sustain their burden of showing that the new plan is a constitutionally impermissible dilution, minimization, or cancellation of the voting strength of the black citizens of Adams County. *See Whitcomb v. Chavis, supra,* 403 U.S. at 144. On the contrary, we find that the plan passes constitutional muster. Further, we reject the plaintiffs' notion that they are constitutionally entitled to have old District Four divided into two predominantly black electoral districts simply because they command a population concentration of sufficient size and contiguity to constitute two equally apportioned dis-

tricts. This rationale was rejected by Justice White for the majority in *Whitcomb*, saying that such a contention

> "...[is] expressive of the more general proposition that any group with distinctive interests must be represented in legislative halls if it is numerous enough to command at least one seat and represents a majority living in an area sufficiently compact to constitute a single-member district. This approach would make it difficult to reject claims of Democrats, Republicans, or members of any political organization . . . who live in what would be safe districts in a single member district system but who . . . are submerged in a one-sided . . . vote.
>
> . . . [It] is not at all clear that the remedy is a single-member district system with its lines carefully drawn to ensure representation to sizable racial, ethnic, economic, or religious groups and with its own capacity for overrepresenting and underrepresenting parties and interests . . ."

403 U.S. at 156, 160.

For the reasons already explicated, we reject the separate claim by Howard, Schoby, and the class they represent that they have suffered a separate unconstitutional dilution by denial of the right to vote in a district where they constituted a majority class prior to redistricting. Inevitably, people of different races, national origins, and contrasting tenets will be shifted under reapportionment plans to districts in which they may no longer be in the clear majority. But when, as here, no racial motivation spawns a change of the voting area of those complaining, and the redistricting plan does not unconstitutionally dilute the voting strength of the complaining minority, there is no abridgement of voting rights.

AFFIRMED.

APPENDIX 5

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

CIVIL ACTION NO. 1352

REVEREND LEON HOWARD, ET AL.,
PLAINTIFFS

VERSUS

ADAMS COUNTY BOARD OF SUPERVISORS, ET AL.,
DEFENDANTS

OPINION OF THE COURT

In June 1971, after a three-judge court was dissolved, it having been determined by that Court that the Attorney General of the United States of America, under and by virtue of Section 5 of the Voting Rights Act of 1964, had voiced no objection to the proposed plan to redistrict the supervisory districts of Adams County, Mississippi, presented by that board of supervisors, a trial on the merits of the plan was had, U. S. District Judge Walter L. Nixon, Jr., presiding. Following the trial Judge Nixon issued his memorandum opinion, dated July 20, 1971, finding that the plan adopted by the Adams County board of supervisors on November 2, 1970, based on the available 1960 Census data, complied with the one-man, one-vote requirement of the equal protection clause of the Fourteenth Amendment, and that the new supervisory district boundaries, as proposed in the plan, were in no wise racially motivated or gerrymanded to dilute the voting strength of a heavy concentration of the black population of Adams County located within the environs of the City of Natchez and to the north thereof. At the time of the formulation of the plan by Comprehensive Planners, Inc., an agency employed by the

board to draw up a redistricting plan, herein called CPI, the only population figures available were those from the 1960 Census. At the time of the trial, 1970 Census figures were available and it became apparent that the population count, by districts, in Adams County had changed to such a degree as to be constitutionally challengeable. While holding the plan constitutional based on 1960 Census figures, and allowing the November 1970 general elections to proceed on schedule, Judge Nixon said: "Nevertheless, the defendants herein shall on or before December 1, 1971, present a constitutionally acceptable revised or modified redistricting plan, based on the 1970 Census figures, which complies with the one-man, one-vote requirement of the Equal Protection Clause of the Fourteenth Amendment."

Pending an appeal of this decision, the Fifth Circuit Court of Appeals, on July 29, 1971, denied plaintiffs' motion for an injunction pending appeal and their alternative motion for an expedited hearing. The Appellate Court in its mandate further provided:

> ". . . that upon the filing of the redistricting plan for the supervisors' districts on or before December 1, 1971, as directed by the district court in its opinion of July 20, 1971, the district court shall expeditiously proceed to hear, determine and pass upon the merits of such a plan, and if any plan presented is not a meritorious plan, then the district court, with the best information available, shall devise one.
>
> "IT IS FURTHER ORDERED that upon the approval of a legally sufficient plan by the district court, and, in any event, not later than May 16, 1972, the district court shall order that a final election be held under the laws of the State of Mississippi in the five (5) respective districts (beats) of Adams County for the selection of a board of supervisors in compliance

with the one-man, one-vote mandate of the United States Constitution. Those supervisors elected pursuant to the terms of this order shall assume and hold the offices to which they are elected within thirty (3) days after such election.

"IT IS FURTHER ORDERED that the district court shall retain jurisdiction of this cause subject only to the provisions hereof.

"We further note, however, that in the absence of the record we do not pass upon appellants' contention that the redistricting of Adams County 'was racially motivated and enacted for the purpose and effect of diluting the voting strength of black voters of Adams County, particularly those residing in old District 4, and of preventing the election of black candidates for office in Adams County.' This contention will be considered when the case is finally submitted to this court for hearing on the merits."

On the merits the Fifth Circuit Court of Appeals affirmed in all respects the decision of the lower court. See *Reverend Leon Howard, et al v. Adams County Board of Supervisors, et al,* No. 71-2361, dated January 6, 1972. The Appellate Court recognized that the focus of the appeal was plaintiffs' claim that the defendants plan was constitutionally impermissible as a racially motivated gerrymander, operating to dilute the voting strength of the blacks of Adams County. The Appellate Court, in dealing with this issue, said:

"As we view the constitutional requirements in this area, to establish the existence of a constitutionally impermissible redistricting plan, in the absence of malapportionment, plaintiffs must maintain the burden of proving (1) a racially motivated gerrymander, or a plan drawn along racial lines, Wright v. Rocke-

feller, 1964, 376 U.S. 52; Gomillion v. Lightfoot, 1960, 364 U.S. 339; Sims v. Baggett, M.D. Ala. 1965, 247 F. Supp. 96, or (2) that '. . . . designedly or otherwise, a(n) . . . apportionment scheme, under the circumstances of a particular case would operate to minimize or cancel out the voting strength of racial or political elements of the voting population.' Burns v. Richardson, 1966, 384 U.S. 73, 88. See Whitcomb v. Chavis, 1971, 403 U.S. 124, 143-144, 149.

"First, a careful consideration of the record leaves us in complete agreement with the finding of the district court that plaintiffs failed to sustain their burden of proving that the CPI plan was the product of a racial motivation or purpose. See Wright v. Rockefeller, supra, 376 U.S. at 56. The record is bare of such evidence. The district court was correct in holding that CPI did not consider, nor were they instructed to consider, the racial makeup of the districts to be drawn.

"These considerations lead us to approve the finding of the district court that plaintiffs failed to sustain their burden of showing that the new plan is a constitutionally impermissible dilution, minimization, or cancellation of the voting strength of the black citizens of Adams County. See Whitcomb v. Chavis, supra, 403 U.S. at 144. On the contrary, we find that the plan passes constitutional muster. Further, we reject the plaintiffs' notion that they are constitutionally entitled to have old District Four divided into two predominantly black electoral districts simply because they command a population concentration of sufficient size and contiguity to constitute two equally apportioned districts.

"For the reasons already explicated, we reject the separate claim by Howard, Schoby, and the class they

represent that they have suffered a separate unconstitutional dilution by denial of the right to vote in a district where they constituted a majority class prior to redistricting. Inevitably, people of different races, national origins, and contrasting tenets will be shifted under reapportionment plans to districts in which they may no longer be in the clear majority. But when, as here, no racial motivation spawns a change of the voting area of those complaining, and the redistricting plan does not unconstitutionally dilute the voting strength of the complaining minority, there is no abridgement of voting rights."

Shortly after the beginning of the current calendar year, this action, in a division of the case load pending in this district, was assigned to this Court, and was set out on a pre-trial calendar for January 24, 1972. At that time, although time for discovery remained open until February 9, 1972, the Court was advised that the board's revised plan had been filed on November 26, 1971 and that there were no objections pending. The case was then set for trial on May 2, 1972. At the request of defendants for a pre-trial on that date, the Court granted the request, learning for the first time that plaintiffs, although still not having made any written objections to defendants' plan or proposals of their own, intended to make objections and file a proposed plan. Defendants strenuously urged against the propriety of this Court's consideration of objections or a plan so untimely proposed. The Court, in the interest of hearing as much evidence as possible within the time limits imposed, reserved ruling on the exclusion of the plaintiffs' objections and proposed plan, and the cause proceeded to trial the next day.

As stated above, defendants' revised plan was filed on November 26, 1971. Attached to it is the board's petition

for the Court's approval, and a copy of the order of the board of supervisors of November 15, 1971, whereby the board has adopted the proposed revised supervisor district lines, and to which is attached a metes and bounds description of each of the four proposed precinct boundaries that will exist in each revised supervisor's district. The plan contains narrative and statistical data and maps showing the proposed boundary lines both in the county and the City of Natchez.

Mr. Hoyt T. Holland, Jr., vice-president of CPI, who testified in the trial before Judge Nixon, and whose qualifications were admitted into evidence, as here, undertook on the board's behalf to explain the modifications proposed. His primary objective, using population data from the 1970 Census, was to relocate the supervisory or beat lines to achieve maximum equality, population-wise, of each beat. Secondary factors, at the request of the board, were to equalize road mileage and square miles in each beat as much as possible. He, and the employees of his firm, used the counts of population appearing in enumerator district printouts compiled by the 1970 Census. There are 41 enumerator districts in Adams County. He split some of these enumerator districts, where necessary, using figures obtained from the Census in the split areas based on a head count rather than housing figures. The submitted plan results in the following table:

District	Population	Deviation From Ideal	Percent of Deviation
1	7,331	–127	–1.70%
2	7,331	+87	+1.17%
3	7,506	+48	+ .64%
4	7,465	+7	+ .09%
5	7,446	–12	- .16%
	37,293		

The norm or ideal population for each beat is 7,458 persons. The above table reveals the widest variation being between Beats 1 and 2, Beat 1 having 127 persons below the norm, and Beat 2 having 87 over the norm, for a maximum variation of 2.87%. According to Holland this variation amounts to 214 people out of 37,293, or less than .6%.

It is worthy to note that from 1960 to 1970, using Census figures, the total population in Adams County has dropped from a total of 39,698 to 37,293, as reflected in Judge Nixon's decision. Where CPI used the 1960 Census in working out the beat lines to acceptable figures, these same lines, using 1970 Census figures caused a variation in population of figures of a –12% in Beat 1 to a +10% in Beat 2. It is readily seen that the proposed revised lines accomplish their purpose in reducing the variation to an acceptable one and in keeping with the recognized desire on the part of the supervisors to equalize road mileage and area as much as possible. The Fifth Circuit, in the circumstances of this case, recognized these desires as practical factors in a re-districting plan where population is to be equalized on a local government level. Other cases have also recognized circumstances which justify departure from a strict mathematical equalization. See *Abate v. Mundt*, ... U.S. ....., June 7, 1971; *Avery v. Midland*, 390 U. S. 474; *Dusche v. Davis*, 387 U.S. 112; and *Sailors v. Kent Board of Education*, 387 U.S. 105.

The Appellate Court likewise put to rest plaintiffs' contention that the configuration of the supervisory districts, extending spoke-line out from the City of Natchez was an intent to gerrymander. As the Court sees it in the present action, the sole issue is whether the supervisory lines as now contemplated, having been revised to meet the constitutional requirements of *Reynolds v. Sims*, may be said

to have been re-drawn in such a fashion as to amount to a racial gerrymander.

The racial composition of the supervisor's districts under the November 2, 1970, plan, using the 1960 Census data, as reported in Judge Nixon's decision:

District	White	Percent	Non-White	Percent	Total
1	4442	56.2	3459	43.8	7901
2	4708	60	3139	40	7847
3	4267	52.7	3823	47.3	8090
4	2606	33.2	5225	66.8	7861
5	4895	61.2	3104	38.8	7999
	20,918	52.7	18,780	47.3	39,698

A similar tabulation, using 1970 Census data, is:

District	White	Percent	Non-White	Percent	Total
1	3586	54.6	2976	45.4	6562
2	4466	60.2	2955	39.8	7421
3	4183	50.9	4031	49.1	8214
4	2288	33.2	4602	66.8	6890
5	4843	59.0	3363	41.0	8206
	19,366	51.9	17,927	48.1	37,293

As noted by Judge Nixon and the Appellate Court the board, at no time during the compilation of the 1970 plan, requested CPI to furnish racial figures. This same is true of the revised 1971 plan. As reflected in defendants' answers to interrogatories, the first computation of racial breakdown of population within the revised districts was begun by CPI following plaintiffs' interrogatories. These computations were completed more than a month after the defendant board adopted the 1971 revisions and filed it with the Court. Based on 1970 Census data, they are:

	POPULATION			PERCENT	
District	White	Non-White	Total	White	Non-White
1	3990	4451	7331	54.4	45.6
2	4471	3074	7545	59.3	40.7
3	4328	3178	7506	57.7	42.3
4	1670	5795	7465	22.4	77.6
5	4907	2539	7446	65.9	34.1
	19,366	17,927	37,293	51.9	48.1

A comparison of the last two tables shows that the racial ratio has remained fairly constant in Beats 1 and 2. In Beats 3 and 5, the white ratio increases while the black decreases. In Beat 4, where non-whites have a majority, the non-white ratio increases with a commensurate decrease in white population. Increasing the non-white population in Beat 4, where non-whites already had a majority and decreasing non-white population in Beat 3, where the ratio was nearly equal under the 1970 plan, is the core of plaintiffs' objections. Oddly, the racial composition of Beat 4 in the 1970 plan under both 1960 and 1970 Census data was the same. Although courts have relied often on statistics for conclusions, it remains to determine whether the above statistics are proof themselves of a racial gerrymander here.

The 1970 plan, by means of a spoke-like configuration, the hub being the City of Natchez, was based on having both rural and city representation in each beat. Under the 1970 plan the population was classified as 36.9% rural and 63.1% urban. As stated by the Appellate Court with reference to the 1970 plan:

> "Equality of population in electoral districts was a primary goal of the revision. Another objective, however, was the equalization of the responsibilities of each Supervisor in exercising their traditional function of highway and bridge maintenance. Thus, the Board instructed CPI not only to equate, as best it could the population of the districts, but also the mileage of roads for county maintenance, and the square mile area of each district. With its land area largely rural, and its population concentrated in one urban area, the realization of these legitimate planning objectives dictated a plan which would consolidate urban and rural areas into each district. As the new plan was

developed, therefore, each district converged in spoke-like fashion from a broad rural base into the City of Natchez. This dissection of the population concentration of the county resulted in an equal allocation of the population of Natchez among the new districts. Under the population figures available to CPI in 1970, prior to the publication of the 1970 Census, the result was a plan in which substantial equality of population was reached in districts that reflected cross sections of urban and rural land areas."

Thus, the Appellate Court gave its approval to a plan having each district representative of rural and urban interests. By retaining this configuration in the 1971 plan that purpose was maintained.

Holland said that his first problem in formulating the revised plan was in equalizing the disproportionate population counts between Beats 1 and 2, those which were shown to have the greatest variance.

Accordingly, the boundary line between Beats 1 and 2 was altered. Otherwise, he stated that he used the same rural boundaries, that is, the beat lines outside the city limits, in the revised plan as those in the 1970 plan. The legal description of these boundaries had been established by the board in the 1970 plan, and, except for a simple alteration in the location of the line between Beats 1 and 2, south of the city, making no changes in the remainder of the rural boundaries is a matter of practicality. In order to keep the rural boundaries constant, it was necessary to make considerable changes in the city in tracking the Census enumerator districts, necessarily more dense and compact than rural enumerator districts, and without disrupting existing voting precincts.

In the 1970 plan, Holland said he came within a 5% variation of his goal for equating road mileage among the

five districts, using only the mileage of county maintained roads. Neither city, state nor federal highways were included. He concedes there is a greater disparity in the 1971 plan, primarily because of the change in the boundary between Beats 1 and 2, where mileage had to be sacrificed for population equality. Had it not been for the time element involved, he stated that he could reduce the present variance of 2.87% in population figures to a lesser figure by a further shift of the boundary between Beats 1 and 2 inside the city.

Turning to the plan offered by plaintiffs, the Court condemns the practice by plaintiffs' counsel of waiting until the day of the trial to present their plan to the Court and opposing counsel as was done in this and another redistricting case heard immediately following this action, particularly in view of the common deadline imposed on this Court for a decision in both cases. Counsel is well aware of this Court's pre-trial requisites of a mutual exchange between counsel for both sides of the issues involved and an exchange of exhibits, among other things. Here plaintiffs had before them the defendants' plan since November 26, 1971. Concededly it takes time for plaintiffs to prepare a proper redistricting plan in the detail necessary for its full implementation. But the defendant board and the Court should have had more opportunity for examination of plaintiffs' plan as to its merits and its disadvantages than one day before trial, and on which day this Court was engaged in hearing another case with a similar problem.

Plaintiffs' plan was prepared by Thomas Gordan Seabrook of Thomas Seabrook & Associates, Memphis, Tennessee. He is a professional in urban planning. The Court recognizes his expertise in his field. However, he admitted that a plan for Adams County was his first venture in county redistricting. Seabrook stated that his criteria was,

first, equality of population, and, second, maintenance of existing supervisory districts. As to the latter, he was referring to pre-1970 boundaries. His plan uses whole Census enumerator districts without separating or splitting any of them. It is noted here that Seabrook, in compiling his narrative descriptions, used the outer perimeters of the government's enumerator district descriptions. On cross examination, with reference to the written descriptions of the beats he admitted errors in tracking from the descriptions of the enumerator districts. Although some errors were reportedly corrected during a recess in the hearing, the Court has no way of verifying the correctness of the remainder of the descriptions. He accepts Census data as free from any taint of inaccuracy, because these counts are made by objective persons. The Court notes that CPI used the same data. The narrative part of this plan as to population equalization is as follows:

District	Total Population		Percent Variance
1	7415		-.58%
2	7399		-.80%
3	7440		-.25%
4	7506		+.63%
5	7533		+.99%
	37,293	Total Spread	1.79%

Except for re-numbering the beats, plaintiffs' plan essentially leaves the boundary lines of each district as they were prior to 1970 with one major change—a new Beat 3 is carved out of old Beat 4, the boundaries of the proposed Beat 3 lying totally within the City of Natchez. The total variant in population would be slightly less than that of defendants, a difference amounting to 80 people or .2 of 1%. The obvious effect of this plan is to give non-whites a majority in the proposed Beats 3 and 4. All beats retain a fairly consistent ratio of urban

population to rural, except Beat 3 which is all urban. This plan, according to Seabrook would call for a shifting from one beat to another of 16,089 people, or 43% of the total population, including over 11,000 within the city itself. These comparisons were based on historic or pre-1970 beat lines and not with the changes already brought about in the 1970 board plans, and the Court gives no special significance one way or another to any of his comparisons with pre-1970 circumstances, except as to the difficulty of the board in giving awareness to the public of major changes in beat lines within two successive years.

Seabrook professed to be ignorant of the court decisions pertaining to the 1970 board plan, saying that his sole concern was equalization, and that his plan has less variance than defendants' revised plan. As to why he located all of Beat 3 within the City of Natchez, he saw no reason why a beat should have both urban and rural representation. This Court, having familiarized itself with the previous record in this case, finds that plaintiffs, having failed before in convincing either the District Court or the Appellate Court that they are constitutionally entitled to a majority population in two beats, have done nothing more in their proposed plan in this trial than make the same contention again as reflected in their plan herein presented. As to this issue, this Court again points to the language of the Appellate Court:

> "Further, we reject the plaintiffs' motion that they are constitutionally entitled to have old District Four divided into two predominantly black electoral districts simply because they command a population concentration of sufficient size and contiguity to constitute two equally apportioned districts."

Aside from the plaintiffs' failure to file their plan, timely, the Court finds that it is a complete departure

from the obvious intent of the District Court and Appellate Court that this trial be limited to whatever revisions might be necessary to defendants' 1970 plan, using 1970 Census figures. This Court finds that, under the laws of the State of Mississippi, boards of supervisors are charged primarily with the maintenance of roads and bridges and that traditionally funds for these purposes have been divided equally among the supervisors, each assuming the responsibility for his own beat. Under plaintiffs' plan, Beat 3 would have no territory, roads or bridges outside municipal limits or jurisdiction. The Court finds that the proposed uses by plaintiffs of enumerator district boundaries established by the Bureau of Census are not necessarily the proper nor legal descriptions required of a board of supervisors and which are readily identifiable from land deed records. The Court finds that plaintiffs have made no provision in their plan for the location of voting precincts in their proposed plan, nor provided a legal description of same. For all of the above reasons, and others as they may have appeared herein, the Court finds that plaintiffs' plan cannot be recommended for approval.

The Court admits it is not happy with defendants' 1971 proposed district boundaries within the northern part of the City that increase the negro majority in Beat 3, and lessen their population percentage in Beat 4, but under the time restrictions imposed on this Court, it has no recourse but to approve it.

As to the elections to be conducted according to the new beat and precinct boundaries, the Court finds that such an election as is authorized under Section 3296 of the Mississippi Code of 1942 should be held. The Court knows of no reason why this special election cannot be held in conjunction with the general Congressional elections in November 1972. Any and all candidates must,

of course, qualify as provided under Section 3260 of the Mississippi Code.

On the basis of the above recited findings of fact and conclusions of law, this Court finds that defendants' revised, proposed plan should be approved. Although no Adams County election commission or commissioners are parties to this suit, the Court directs the board of supervisors, in cooperation with the election commissioners, to order a special election as herein provided, after first giving reasonable publicity thereto. As directed by the Fifth Circuit Court of Appeals in its order of July 29, 1971, the supervisors so elected shall assume and hold the offices to which they are elected within thirty days after such election.

An appropriate Order may be submitted.

/s/ Dan M. Russell Jr.
United States District Judge

DATED: May 15, 1972

APPENDIX 6

CORRECTED
IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-2596

REVEREND LEON HOWARD, ET AL.,
Plaintiffs-Appellants-Cross Appellees,

versus

ADAMS COUNTY BOARD OF SUPERVISORS, ET AL.,
Defendants-Appellees-Cross Appellants.

Appeals from the United States District Court for the Southern District of Mississippi

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(July 2, 1973)

Before WISDOM, GEWIN and COLEMAN,
Circuit Judges.

COLEMAN, Circuit Judge: One wing of this appeal is an attempted re-run of the decision of this Court in *Howard v. Adams County Board of Supervisors,* 5 Cir., 1972, 453 F.2d 455, cert. denied 407 U.S. 925. That case dealt in depth with the contention there raised, and now sought to be raised anew, that the districts for the election of county supervisors in Adams County, Mississippi had been racially gerrymanded and had resulted in an impermissible dilution of the black vote for the election of supervisors in that County.

The present controversy centers upon a court ordered and court approved redistricting of Adams County dated November 26, 1971. Appellants contend that the November 26, 1971 plan (1) resulted in malapportionment of the districts and (2) dilutes the black vote for the election of supervisors. We find no merit in the first contention and the second was settled by our prior decision, *Howard v. Adams County Board of Supervisors, supra.* Accordingly, the judgment of the District Court is affirmed. Defendants-appellees have cross-appealed the order for new elections in the reconstituted districts. We also affirm the judgment in this respect.

The division of Adams County into five districts of substantially equal population for the election of county supervisors is beset by special obstacles. On its western side, the County borders the Mississippi river. Half the population of the County lives in the City of Natchez. An extensive swamp in the southwestern section of the County, a National Forest in the eastern section, and other large uninhabited areas in the County, raise additional difficulties.

Divided absolutely equally the population of each district would be 7458. It is immediately apparent, therefore, that while county supervisors have no jurisdiction over the construction and maintenance of city streets and do have exclusive jurisdiction of such activities in regard to county roads, a five way split in county population dictated that in some manner most, if not all, districts would have to encompass some territory within the City. In the plan approved by the District Court and presently under review, the districts were drawn to fan in, out and from the City, like the spokes of a wheel. Some part of the City is included in each of the five supervisor's districts. While this approach, from the standpoint of geo-

graphical area and roads is a long way from ideal, it did divide the population as follows:

District	*Total*	*Variance*	*Percentage of Variance*
1	7331	–127	–1.70%
2	7545	+ 87	+1.17%
3	7506	+ 48	+0.64%
4	7465	+ 7	+0.09%
5	7446	– 12	–0.16%

This means, of course, that the average deviation among the districts is less than 1% of the norm, the greatest overage being 1.17% in District 2 and the maximum deficiency being 1.70% in District 1. Out of a total population of 37,290 people, the greatest deviation (between Districts 1 and 2) was 214.

On Friday before the case was scheduled to go to trial on the following Monday, the plaintiffs filed their proposed plan of county-district reapportionment. This plan would have divided the population of the five districts as follows:

District	*Population*	*Variance from Norm*
1	7415	–0.58%
2	7399	–0.80%
3	7440	–0.25%
4	7506	+0.63%
5	7533	+0.99%

The variations in two of the districts were greater than those appearing in the Board plan, but less by an average of 0.60% than that proposed for the other three districts.

The plaintiffs' plan produced an overall population spread between the most populated and the least populated districts of 134 persons. This compared to a maximum spread of 214, or a difference of 0.20%, in the Board plan.

It is now argued that the trial court should have accepted this plan rather than the one submitted by the Board. It is said that this plan was made strictly from official Census units, but the population accuracy of the Board plan had also been verified by the Census Bureau.

It is said that the proposed plan more nearly conformed to pre-reapportionment district lines. It must be remembered, however, that prior to reapportionment, according to the 1970 Census, District 1 had 13,590 people, District 4 had 15,074, District 5 had 6,064, District 3 had 1,492, and District 2 had 1,073. Districts 1 and 4 had to be reduced by about 50% while Districts 2, 3, and 5 required a radical increase, almost 700% in District 2 and nearly 600% in District 3. Therefore, any idea of substantially conforming to former district lines would border on the hopeless.

Under the plan proposed by the plaintiffs, the black population in District 3 would have been 77.07% of the district while the black population of District 4 would have been 70.44% of the district. This would have been accomplished by the division of old (pre-1970) District 4 into two predominantly black districts, the goal contended for and rejected in *Howard v. Adams County Board of Supervisors, supra.*

Moreover, District 3 would have been entirely contained within the corporate limits of the City of Natchez and would have destroyed the spokelike configuration of each of the districts, which combined rural with urban population. Under the plaintiffs' plan, the supervisor for District 3 would have had no county roads to supervise or

maintain, one of the more important functions imposed by law upon members of the Boards of Supervisors.

We cannot hold that the District Court, sitting as a chancellor, abused its discretion in exercising a choice between two alternatives so clearly matched as were the plans here in issue. A net difference of 2/10 of 1% in the population ratios of the two plans is simply not enough for us to substitute our opinion for that of the trial judge. Moreover, there were important considerations here such as existed in *Abate v. Mundt*, 1971, 403 U.S. 182, 91 S.Ct. 1904, 29 L.Ed.2d 399. Additionally, we are of the opinion that the Court approved plan adheres to the principles enunciated in *Reynolds v. Sims*, 1964, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506.

Further pursuing the subject of dilution of the racial voting power, neither the plaintiffs nor the defendants have provided us with data as to voting strength in the various proposed districts now under review. They do give the population figures:

District	*Black*	*White*
1	45.6%	54.4%
2	40.7%	59.3%
3	42.3%	57.7%
4	77.6%	22.4%
5	34.1%	65.9%

It is to be noted that in District 4 blacks number 77.6% of the population; under the plan considered as to racial dilution in *Howard v. Adams County Board of Supervisors, supra*, blacks amounted to 67%. This was the only district in *Howard* which had a majority of blacks and thus able to elect a supervisor if voters voted solely upon racial considerations. It still has that majority, increased by 10% as

reflected by the 1970 Census, rather than 1960. As did the *Howard* panel [Judges Gewin, Goldberg, and Dyer] we hold that the trial court was under no duty wholly from municipal territory to erect an additional "black district", in which the supervisor would be shorn of some of his primary official functions and to that extent would be reduced to a mere figurehead. There is nothing new in the racial dilution arguments contained in this appeal. We are consequently bound by and adhere to the prior panel decision on that subject.

The defendants-appellants have cross appealed from the order requiring that an election be held to choose supervisors from the newly constituted districts. Such an election has already been ordered by a prior panel of this Court. The present panel is no more at liberty to set aside that order than to reverse the decision of the prior panel on the racial dilution issue, nothing new nor material being raised.

AFFIRMED on direct and cross appeals and remanded for further proceedings consistently herewith.

APPENDIX 7

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-2596

REVEREND LEON HOWARD, ET AL,
Plaintiffs-Appellants-Cross Appellees,

versus

ADAMS COUNTY BOARD OF SUPERVISORS,
ET AL,
Defendants-Appellees-Cross Appellants.

Appeals from the United States District Court for the Southern District of Mississippi

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ON PETITIONS FOR REHEARING AND PETITION FOR REHEARING EN BANC
(Opinion July 2, 1973, 5 Cir., 1973, ... F.2d .....).

(August 15, 1973)

Before WISDOM, GEWIN and COLEMAN,
Circuit Judges.

PER CURIAM: The Petitions for Rehearing are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

APPENDIX 8

U.S. DEPARTMENT OF COMMERCE
Social and Economic Statistics Administration
Bureau of the Census
Washington, D.C. 20233

OFFICE OF THE DIRECTOR

Jul 13, 1973

Honorable Lucien C. Gwin, Jr.
P. O. Box 1384
Natchez, Mississippi 39120

Dear Mr. Gwin:

Senator Eastland's office has asked me to send you the enclosed material relating to our announcement of the net census undercount in the 1970 Census of Population. This will also serve as a reply to your letter of July 6 to us on this subject.

As indicated by the enclosed materials, we estimated that the Census Bureau failed to count approximately 5.3 million persons, or about 2.5 percent of the population. In accordance with your request, the news release on the 1970 Census Coverage has been authenticated by the seal of the Bureau of the Census.

Please let us know if we can be of any further assistance.

Sincerely,

/s/ Vincent P. Barabba
Acting Director
Bureau of the Census

Enclosures

A76

UNITED STATES DEPARTMENT OF
COMMERCE NEWS
WASHINGTON, D.C. 20230
Social and Economic Statistics Administration

CENSUS

John Casserly
(301) 763-7273

For Release at Noon EST, April 25, 1973

CB73-100

CENSUS BUREAU REPORT ON 1970 CENSUS COVERAGE

An estimated 5.3 million persons were not counted in the 1970 Decennial Census, the Bureau of the Census reported today. The Bureau noted that the rate of estimated undercoverage (approximately 2.5 percent) was lower than for both the 1960 and 1950 censuses.

An estimated 5.1 million persons were not counted in both the 1960 and 1950 censuses. However, there were about 24 million more persons counted in 1970 than in 1960, and approximately 52 million more persons than in 1950.

The 1970 rate of underenumeration was estimated at approximately 2.5 percent, about 0.2 percentage points lower than the 1960 rate of 2.7 percent and approximately 0.8 percentage points lower than the 1950 rate of 3.3 percent.

The Bureau, part of the U.S. Department of Commerce's Social and Economic Statistics Administration, said that improved coverage techniques, introduced in the 1970 Census, enabled it to record these gains.

The new 1970 techniques were carried out after careful study and trial and included special measures for areas known to be difficult to enumerate. The Bureau was able to measure the effect of some of these techniques on the population count and reported that they enabled the Census operation to count about 2.3 million persons that would probably have been missed if only past methods had been used. (Details of the new coverage techniques as well as evaluation of their effects may be found in the attached NOTE TO CORRESPONDENTS.)

These techniques helped compensate for changing lifestyles, attitudes and other factors which tended to make Census-taking more difficult in 1970. Some of these obstacles were: increased resistance on the part of the population to being interviewed, surveyed, etc. . . more "alienation" and "distrust" of government and "authority" in general . . . more organized attempts to protest the Census . . . that segment of the labor market which had traditionally been the source of the supply of enumerators was declining . . . fear of being in the streets in many sections of large cities inhibited many of the remaining available personnel from applying for enumerators' jobs . . . increases in the proportion of the population in age-sex-race categories that have traditionally had above-average omission rates.

The Bureau issued the results of its intensive analysis of the population count in three technical papers (to be delivered tomorrow at the annual meeting of the Population Association of America in New Orleans. The papers are attached.) *These studies were done at the Bureau's own initiative by its professional staff members.* Similar studies were done on the 1960 and 1950 census.

The Bureau explained that the 5.3 million estimate of the number of persons missed in the 1970 Census is

not a fixed, precise number, but the best estimate within a range of 4.8 to 5.8 million. The comparable best estimate for both 1960 and 1950 is 5.1 million.

Other highlights of the studies are:

— The undercount for white persons in 1970 was 3.45 million persons or a rate of 1.9 percent. The comparable 1960 figures were 3.25 million persons, a rate of 2.0 percent.

— The undercount of blacks in 1970 was estimated at 1.88 million persons or 7.7 percent. The comparable figures for 1960 were 1.63 million persons, a rate of 8.0 percent.

— Most of the improvement for blacks occurred among females and young black males. The underenumeration rate for black females dropped from 6.3 percent in 1960 to 5.5 in 1970. The rate for young black males (age 15-24), declined from about 15 percent in 1960 to approximately 8 percent in 1970. The only large segment of the black population which showed a significant deterioration in coverage was black children under 10 years of age. Their omission rate increased from about 5.3 percent in 1960 to 8.6 percent in 1970.

The method used to produce these results is based on a technique of developing the estimated U. S. population independent of the Census, and then comparing the Census counts to the expected numbers. The estimated population is developed by utilizing available figures on births, deaths, Medicare enrollment, immigration-emigration, past census data and complex analyses of age-sex-race distributions. Some of the data used probably have imperfections, and some subjective assumptions are necessary in deciding on the methods of analysis. Consequently, the undercount rates quoted above cannot be viewed as

final or definitive, but rather as the current best estimates. However, the range of possible error does not appear to be very wide. A series of alternative assumptions were made and they did not affect the undercount figures seriously. Thus, the likely maximum range for the total number of persons missed is 4.8 to 5.8 million persons; the parallel range for the rate is 2.3 to 2.8 percent. Most individual sex-age-race groups are similarly moderately affected.

If new data or refinements in techniques are developed in the future, the Bureau of the Census will, of course, revise its estimates. Such revisions have been made in the previously reported estimates for 1960, derived mostly from new data available on Medicare enrollment, and methodological refinements. The 1960 figures quoted here are, therefore, somewhat different from those appearing in earlier Bureau reports.

After both the 1950 and 1960 Censuses, the Bureau of the Census tried several additional techniques to measure coverage. They did not appear to yield reliable estimates and the Bureau's professional staff then decided that the best approach was through the types of analysis described above.

The Bureau also reported that with presently known statistical techniques *it is not possible to prepare reliable coverage estimates for the population of Spanish ancestry or of other minority groups.* The statistics of births, deaths, and net immigration needed to produce the estimates for persons of Spanish ancestry or the other minority groups do not exist with the accuracy required for this analysis. Such statistics cannot be compiled from present records.

The Census Bureau is also not able to prepare reliable estimates of undercoverage for individual States, counties,

cities or other areas smaller than the U. S. total. The major reason is that data on internal migration are needed to produce independent population figures for these areas. Migration figures are not available with the high degree of precision that is necessary.

The impact of underenumeration on such uses as Congressional apportionment, legislative redistricting and allocation of funds among States or other local areas, as in revenue sharing, depends principally on the variation in the rate of underenumeration from place to place. If the rates of underenumeration were the same in all areas, then each area's share would be unaffected by any undercoverage. It is unlikely that complete uniformity exists. *However, as stated previously, there is no way of arriving at reliable estimates of coverage error for individual jurisdictions.*

The studies also reported that the Bureau was well satisfied with the effect of the mail census—used for the first time in 1970—on the population count. The methods of conducting the mail census appear to have been responsible for important improvements in coverage of occupied housing units, that is of the homes and apartments in which people live.

It was reported that special programs used for the first time in 1970 added over one percent to the final population count in 1970 (the 2.3 million persons mentioned on page 1 of this news release). These programs included such devices as: the large scale use of postal workers to check the completeness of the census address listings; special checks of housing units reported as vacant; foreign language aids; gaining the cooperation of many national and local minority group organizations; and a number of steps to improve enumeration in the inner-city parts of large cities, including higher pay rates to

enumerators, closer supervision, more extensive training, assistance centers, and more intensive public information efforts. Without these special programs, the completeness of the count would have dropped below both the 1960 and 1950 levels.

Further information on technical and other aspects of population coverage appears in the attached *NOTE TO CORRESPONDENTS.*

NOTE TO CORRESPONDENTS

This attachment reviews the specific measures the Bureau undertook before and during the 1970 Decennial Census to widen the coverage of the population and thus reduce the likelihood of people being missed in the official count of the population.

It sketches early attempts at coverage improvement . . . summarizes the program for coverage improvement developed for 1970 . . . discusses in detail attempts to improve the count in difficult-to-enumerate areas . . . describes methods for getting an improved count of minorities . . . and furnishes a summary of the effectiveness of the program.

CENSUS BUREAU BACKGROUND STATEMENT IN CONNECTION WITH THE DECENNIAL COVERAGE PRESS RELEASE

In connection with the 1970 Census of Population and Housing, the Bureau carried out a series of measures aimed at 1) improving public cooperation and in order to insure more complete coverage, and 2) technical improvements in the census process to attain greater coverage.

In both cases, the purpose was to reduce the likelihood of people being missed in the count. The Census Bureau

developed a clear-cut program and strategy aimed at reducing the problems that the Bureau knew it would face:

Development of Coverage Improvement Program. The Bureau started work on developing the special techniques for improving coverage as soon as the 1960 Census was completed. It drew on research during the 1950's when experiments had been carried out involving such techniques as the use of neighborhood leaders as enumerators, use of forms filled out by school children to match against census forms, and matching census results against various local records.

Similar experiments continued during the 1960's until final plans for the 1970 Census were completed. One of them, use of postal letter carriers to check missed residential addresses, led to plans for the 1970 mail census. Special censuses conducted during the 1960's in Fort Smith, Arkansas; Skokie, Illinois; the Louisville metropolitan area, Kentucky; Cleveland, Ohio; New Haven, Connecticut; Dane County (Madison), Wisconsin; and, Trenton, New Jersey enabled the Bureau to refine the basic strategy for the mail census in urban areas in 1970. These and other special censuses were also used to explore additional methods of detecting persons who might otherwise be missed in censuses. On the basis of these studies, a number of special procedures were added to the census plans.

Most of the following were entirely new techniques aimed at improving coverage. The purpose in reviewing them is to offer an insight into the complex factors involved in taking a decennial census and how the Bureau faced the major problems.

Concentration on Hard-To-Enumerate Areas. 1970 census planning paid particular attention to the question of areas known to present difficulties, especially hard-to-enumerate urban areas. In 1966, a committee on hard-

to-enumerate areas was organized within the Bureau. It met weekly for about two years to hear the evidence and suggestions of a variety of specialists. The committee included representatives of various disciplines involved with the problem of census coverage. Many new ideas were developed and accepted as a result of these meetings.

Three-Pronged Coverage Improvement Program Adopted for 1970. A tentative coverage improvement program to be applied nationwide was adopted in final form in the summer of 1969. Three methods were to be used to improve coverage: 1) attempt to develop a more understanding and informed climate of public opinion toward the taking of the census; 2) improve the administration of the enumeration operations in the difficult-to-enumerate urban areas, and 3) introduce specific techniques to identify persons likely to be missed with ordinary census procedures, and add them to the census total.

Special Procedures in 20 Large Cities. In 20 large cities with areas of high population density and substandard housing, these major steps were taken:

a. *Organization of 45 Special Offices* for conducting the census (the 1970 census was taken from 393 district offices). Called *centralized offices,* the 45 special offices were administered differently than those in the rest of the U.S. Centralized offices had fewer workers per supervisor, paid higher piece rates for work, had smaller workloads, and were run by Bureau professionals rather than temporary personnel. They were located in difficult-to-enumerate areas.

b. *Precanvass of Housing.* Prior to April 1, 1970, buildings (especially multiunit structures), in selected areas of the 20 cities, were visited by enumerators to

confirm the count of housing units on the Census Bureau records. Any units not already on the Bureau's master address registers were added.

c. *Missed Persons Campaign.* During the actual enumeration, local organizations and civic officials cooperated with Census District Offices in a special missed persons campaign. This was primarily aimed at ghetto areas. Cards headed "Please Make Sure I Am Counted in the Census" with spaces to fill in name, address, sex, race, age, and marital status were distributed by city and community organizations to people in casual settings (public places such as neighborhood grocery stores, etc.) The cards were printed in Spanish and Chinese as well as in English.

d. *Movers Operation.* In some 20 major cities, post office change-of-address forms were used to identify people who moved during the period when field follow-up of the enumeration was taking place.

e. *Assistance Centers.* These were places that the public could call or visit for help in filling out census forms. This was in addition to telephone answering service available in all U.S. district offices. They usually had some bilingual answerers who could help Spanish, Chinese, or Japanese persons.

f. *Special Publicity Program.* Much of the 1970 publicity effort was national in scope, but certain special measures were applied in the neighborhoods covered by the centralized district offices. Black personnel of the Bureau explained the importance of the census in black communities, especially through use of radio. Help from prominent Latin Americans was obtained to improve cooperation from Spanish-speaking people. Billboards were placed in high density areas, and flyers distributed through school

systems. Special brochures were distributed in black and Spanish areas.

In Spanish-speaking neighborhoods, enumerators were furnished with a translation of the census questionnaires with which to answer questions. In addition, Spanish translations of the instruction sheet were made available to individuals through a variety of methods. Chinese translations were distributed in Chinese-speaking areas. Bilingual enumerators were hired whenever possible, and interpreters were hired to help with field follow-up where needed.

"Were You Counted?" forms, a standard means of counting people who might have escaped all the conventional follow-up procedures, were translated into eight foreign languages and distributed to ethnic newspapers.

Sound trucks were used in New York City and Newark, New Jersey, to augment regular publicity, and paid ads were employed in both New York and Chicago. Paid radio commercials were used in New York to urge cooperation in the census. (Part of the national publicity was developed with assistance from the Advertising Council, a group that devotes its time and talent exclusively to public service projects. The Council said its campaign resulted in the equivalent of $8.8 million in space and air time contributions by the media).

Community Education Program. The Community Education Program, aimed chiefly at black and Spanish speaking neighborhoods but also Chinese and Japanese and others, was established to improve understanding of the importance and value of the census in hard-to-enumerate areas. The Bureau hired a team of black and Spanish-speaking specialists who worked nationwide toward this goal by:

a. Addressing local groups and explaining the need for an accurate census count and the benefits that such would provide communities.

b. Acting on advice to improve communications concerning the census between the Bureau and local groups.

c. Distributing census literature through local groups. These activities still continue on a reduced scale for continuing Bureau programs.

Intensified Efforts to Recruit Local People. During the 1970 census, the Census Bureau used many new techniques to recruit local persons as enumerators. For example, it used an unprecedented number of newspaper ads, spot announcements on radio and television and flyers and brochures in local post offices, and in beauty parlors and barbershops, doctors and dentists offices, and many other public places. Ministers publicized the census message from their pulpits as never before.

The National Urban League referred many persons to take the test for enumerator jobs and the Bureau also sought referrals from other minority organizations and community action groups.

Testing was done at a variety of places so as to make it easier for prospective employees to take tests for enumerator posts. These tests were conducted in assistance centers, schools, churches, neighborhood centers and other local places.

The Bureau's Work with Black Organizations. The Bureau contacted major black organizations across the country well before the 1970 census to enlist their aid in obtaining maximum coverage of black communities as well as black citizens in general. The following organizations made contributions to the census effort: The National Urban League, National Association for the Advance-

ment of Colored People, Southern Christian Leadership Conference, National Association of Business and Professional Women, National Association of Marketing Developers, National Medical Association as well as national religious groups and others.

Involvement of Spanish-speaking Organizations in the 1970 Census. In 1967, the Inter-Agency Committee on Mexican-American Affairs (forerunner of the Cabinet Committee on Opportunity for the Spanish-Speaking) met with the Bureau concerning the 1970 census.

The Bureau invited other Spanish-speaking organizations and prominent individuals to offer recommendations regarding a public information program to inform the Spanish-speaking about the importance of the 1970 census to them.

Some of the organizations which played an active role were the Cabinet Committee (so named by 1969), Mexican-American Anti-Defamation Committee, Project of Adelante, Mexican-American Youth Organization, Southwest Council of La Raza, the Civil Rights Commission and the Equal Employment Opportunity Commission.

Efforts to improve coverage of the Spanish-speaking included preparation by the Bureau of the booklet "We, The Mexican Americans," in both English and Spanish; and, a public information program that distributed a massive volume of census literature to the Spanish-speaking in all 50 States.

National Vacancy Check. In addition to procedures that addressed themselves especially to coverage in the major cities, particularly in hard-to-enumerate areas, there were major aspects to the coverage improvement program that were applied nationwide.

The National Vacancy Check was one of them. After the 1960 census, the Bureau discovered that an important cause of undercounting was the fact that enumerators classified some housing units as vacant when, in fact, the residents were only away temporarily. A procedure for checking on these reported housing unit vacancies was carried out between June and October 1970 to learn how many units had, in fact, been occupied, and adjustments were made in the census count to correct for this.

Postal Check in Southern States. To improve coverage in rural areas not included in the two-way mail census in 1970, a special postal check was done in 16 Southern States. The purpose was to enable the Bureau to benefit from coverage improvement that had already been shown possible—having letter carriers check for missed housing units.

RESULTS OF 1970 EFFORTS

Among the special procedures and arrangements used to improve the 1970 count, some can be evaluated quite precisely for effectiveness but others cannot. Where evaluation was possible, it was done in terms of estimates of the number of persons added to the census count who would have been missed without them.

Among those for which no final knowledge of their contribution to the census count exists are the special publicity efforts, assistance centers, use of centralized offices, foreign language aids, the special enumerator training, and the community education program.

Estimated 2.3 million Added. As a result of the coverage improvement program, however, it is estimated that a total of 2.3 million persons or 1.1 percent of the 1970 count was added because of the contributions of those aspects that can be evaluated.

Housing Unit Coverage. The Bureau reported that important gains were made in reducing errors in housing unit coverage in large cities and in the South. It described this as "encouraging" because those were precisely the areas in which coverage errors were the greatest in 1960. A considerable effort was made to improve in these particular areas during the 1970 census. The estimated missed rate of housing units for the South, for example, was approximately 1.6 percent, a substantial improvement over 1960.

Of the total, it has been estimated that 1,075,000 were added as a result of the national vacancy check; 485,000 by the postal check in 16 Southern States; 234,000 by the precanvass of housing units; 120,000 by the use of "*Were You Counted*" and other supplemental forms used to count people not covered by the regular census questionnaire; 15,000 by the movers' check; and 380,000 by a special question on the regular questionnaire that was designed to discover housing units missed in the regular canvass.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-723

ADAMS COUNTY BOARD OF SUPERVISORS, SAMUEL L. CAUTHEN, A. BOYD SOJOURNER, JAMES H. CARTER, IKE FOSTER and E. A. REDD, members of the Adams County Board of Supervisors,

Petitioners,

versus

REVEREND LEON HOWARD and BARNEY SCHOBY, individually and on behalf of all others similarly situated,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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IN THE
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On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The Order of the Court of Appeals requiring a special election for supervisors after approval of a constitutionally acceptable redistricting plan was entered July 29, 1971, and is attached to the Petition (App. 2, A43-A44). This Order merged with the

final decision of the Court of Appeals rendered January 6, 1972, 453 F.2d 455 (5th Cir. 1972) (App. 4, A46-A52), and this Court declined to review that decision on a petition filed by the respondents here, 407 U.S. 925 (1972).

STATEMENT

As we shall more fully discuss *infra*, this Petition, by which petitioners seek to relitigate the propriety of the Court of Appeals' July 29, 1971 Order, is untimely, and that Order, rendered to effectuate respondents' rights to election of members of a county governing board from districts equal in population, was clearly correct as a matter of law, presents no conflict either with the decisions of this Court or with the decisions of other Circuits, and does not present any substantial Federal question.

Respondents, two Black registered voters (Rev. Howard was also an unsuccessful supervisor candidate in the 1971 elections) in Adams County, Mississippi, filed their complaint on May 5, 1971, against the petitioners under the Federal equal voting rights statutes and the Fourteenth and Fifteenth Amendments to the United States Constitution seeking invalidation of the petitioners' November 2, 1970 county redistricting plan for (1) racial discrimination against Black voting strength, and (2) malapportionment of population among the five Adams County supervisors' districts, which serve as election districts for members of the Board of Supervisors, the county governing board.

Although Adams County is 47.9 percent Black, no Blacks have been elected to the all-white Adams County Board of Supervisors since Reconstruction (if then) because the political processes leading to nomination and election of public officials were closed to Blacks and because Blacks have been denied equal opportunities to participate in the political processes and to elect public officials of their choice as a result of voter registration dicrimination and franchise dilution. In its opinion of July 20, 1971 (on which the July 29 Order of the Fifth Circuit was based) (App. 1), the District Court specifically found: "Prior to the passage of the Voting Rights Act of 1965, qualified Black voters in Adams County, Mississippi were substantially disfranchised; however, after its passage a substantial number of Blacks therein registered to vote . . ." (App. 1, A9).

The effectiveness of the votes of the newly enfranchised Black voters was then cancelled out when, shortly after the passage of the Voting Rights Act, the Mississippi Legislature in the spring of 1966 enacted a statute (Act of May 27, 1966, ch. 290, [1966] Gen. Laws Miss 374, amending Miss. Code Ann. § 2870) permitting boards of supervisors to switch from district supervisors elections, the traditional method, to at-large, countywide elections, and shortly thereafter the all-white Adams County Board ordered such a switch from district to at-large elections for the 1967 county supervisors elections (Petition, pp. 3-4, App. A10-A13). The District Court further found that in 1969 this Court in *Fairley* v. *Patterson*, decided sub nom. *Allen* v. *State Bd. of Elections*, 393 U.S. 544, held

that the 1966 amendment to Miss. Code Ann. § 2870 was a change in election procedures required to be cleared pursuant to § 5 of the Voting Rights Act, 42 U.S.C. § 1973c (App. A12), and that as a result the Adams County Board, the defendants in *Marsaw* v. *Patterson* (one of the cases consolidated with *Fairley* v. *Patterson* when it reached this Court), was enjoined from holding at-large county supervisors elections unless and until the required Section 5 clearance of the authorizing statute had been obtained (App. A13).

When the Mississippi Attorney General submitted the amendment to the United States Attorney General for clearance, an objection was lodged (App. A13) on the ground that "this amendment had as its purpose and effect the denial or abridgment of the right to vote on account of race and color" (App. A7)

Petitioners correctly point out that although this Court in *Allen* held that the proposed change was required under Section 5 to be cleared by Federal authorities prior to implementation, this Court declined (5-3) to set aside the 1967 county supervisors elections held under the amendment because the Section 5 coverage questions presented "involve complex issues of first impression — issues subject to rational disagreement." 393 U.S. at 572.

The District Court's findings further reveal that the votes of Adams County blacks were further diluted by the fact that the only district to gain a Black voting majority after the passage of the Voting Rights

Act (District 4) was severely malapportioned and underrepresented, being twice the norm (App. 1, A14).

The method chosen by Comprehensive Planners, Inc. (CPI), the Board's planning agent, for distributing the population among the five districts in the November 2, 1970 redistricting plan was, according to the Record and the District Court's findings, both racially oriented and completely defective in terms of accuracy. During March, 1970 (at the same time the 1970 Census was being taken),[1] CPI identified each of the occupied houses in Adams County by land section according to the race of the occupants, and then estimated the population of each land section, by race, not by a population count but by multiplying the number of houses for whites and non-whites in each land section by a racially differentiated "house occupancy factor" (different for whites and nonwhites) based on 1960 Census house occupancy data (App. A15-A16). The factors used, according to the District Court opinion, were "3.3 Whites per house and 3.6 Non-whites per house in the City of Natchez, and 3.8 Whites and 4.6 Non-whites per house in the rural area" (App. A16). The new proposed district lines then were drawn onto a racially-designated house count map to distribute population among the five districts.

However, when the results of the 1970 Decennial Census of Population became available in February or

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[1]In the redistricting plan, CPI purported to state the population for Adams County, and for the five proposed districts, "on April 1, 1970" (Redistricting Plan, p. 3), the precise date of the 1970 Decennial Census.

March of 1971, the 1970 Census showed that CPI had erred considerably both in estimating the 1970 population for Adams County (error of 6.4 percent) and in estimating the population in each of the five districts whose boundaries were determined by the redistricting plan (App. A16-A17). The Record shows that CPI mis-counted the number of occupied houses in the City of Natchez, where almost 50 percent of the county population resides, by 424 houses (CPI found only 2,763 non-white occupied houses and only 3,103 white occupied houses in Natchez, while the Census found 2,970 non-white occupied and 3,324 white occupied houses), and that the "house occupancy factors" used, based on 1960 Census house occupancy data, were as much as 14 percent off from the 1970 Census data.

As a result, using 1970 Census data, the District Court found that three of the districts in the Board's 1970 redistricting plan deviated from population equality by a variance of 10 percent or more. District 1 was found to be overrepresented by a variance of −12.03 percent, and Districts 3 and 5 were found to be underrepresented by variances of +10.12 and +10.01 percent from the norm, for a total span of 22.15 percentage points of variance and a ratio of 1.252 to 1 between the largest and smallest districts (App. A17, A36). Although the District Court found that "the plaintiffs have failed to meet this burden of proving that the new district lines were drawn by or for the defendants on racial lines or that the defendants or CPI were motivated by considerations of race, creed or country of origin in creating the new districts" (App. A24), the

District Court did hold that "the 22.15% deviation from equality present herein, based on the 1970 Census data, does not in this Court's opinion pass constitutional muster under the one-man, one-vote equal protection provision of the Fourteenth Amendment to the United States Constitution" (App. A36).

The District Court ordered the Board to present, on or before December 1, 1971, a constitutionally acceptable redistricting plan based on the 1970 Census figures which equalized population among the districts (App. A41), but denied plaintiffs' request for an injunction against holding the 1971 county elections on the basis of the unconstitutional districts, inter alia, because the qualification deadline for candidates had passed, the date for the first primary was fast approaching, and hurried, last minute changes would confuse the voters (App. A37-A40).

The District Court rendered its final decision on July 20, 1971. Plaintiffs filed their notice of appeal to the Fifth Circuit the next day, and subsequently thereafter filed with the Fifth Circuit a motion for injunction pending appeal with a supporting memorandum and exhibits requesting that the Board be enjoined from using the unconstitutional November 2, 1970 redistricting plan in the 1971 county elections and that the 1971 elections be held on the basis of the old (pre-1970) districts or, in the alternative, that the 1971 county elections be stayed pending submission and approval of a constitutionally acceptable redistricting plan. Plaintiffs also requested alternatively that they be allowed an expedited hearing on their appeal.

The respondents' contention that they were denied a hearing (Petition, p. 12) is entirely without foundation. Respondents filed their own notice of appeal contesting the finding that their redistricting plan was unconstitutional for malapportionment. They also filed a 3-page Answer to the motion for injunction pending appeal and an 11-page supporting Memorandum Brief in which they argued that plaintiffs would suffer no "irreparable injury" by the timely holding of the 1971 county elections on the basis of the unconstitutional plan, that the decision of the District Court refusing to stay the elections was within its discretion, that the plan was not racially discriminatory, and that the District Court erred in finding the plan unconstitutional.

The July 29, 1971 Order (App. 2, A43-A44), rendered by a three-judge panel of the Fifth Circuit, steered a middle course and rendered substantial justice to both sides. Plaintiffs' motion for an injunction to hold the 1971 county elections on the basis of the pre-1970 districts, to stay the 1971 county elections, or to expedite the appeal was denied. The District Court's order requiring the Board to formulate a constitutionally acceptable redistricting plan was to remain in full force and effect, subject only to the modification that upon approval by the District Court of a constitutionally acceptable plan, not later than May 16, 1972, the District Court was to order a special election on a district basis for the election of new supervisors who were to assume office 30 days after elected. Plaintiffs' contention that the November 2, 1970 plan discriminated against Black voting strength was, in the absence of the record, reserved for consideration when the case

was finally submitted to the court for hearing on the merits.

On January 6, 1972, the Fifth Circuit affirmed the decision of the District Court (App. 4, A46-A52), both on plaintiffs' contentions that the 1970 redistricting plan constituted a gerrymander of Black voting strength, and on the Board's contentions that the District Court erred in invalidating the plan for unconstitutional deviations from population equality. The January 6, 1972 panel considered that the issue of new elections had been disposed of by the court in its July 29, 1971 Order (App. 4, A47, n. 1). But even if the July 29, 1971 Order can be characterized as an "interlocutory order," as petitioners do, then that Order merged with the January 6 judgment, and became the final judgment of the Court of Appeals.

The Board (petitioners here) neither petitioned the Fifth Circuit for a rehearing nor petitioned this Court for a writ of certiorari to contest the July 29, 1971 Order of the Fifth Circuit, merged with its January 6, 1972 decision, requiring new elections. The plaintiffs petitioned the Fifth Circuit for a rehearing on the racial gerrymandering issue, and when that was denied, filed a petition for a writ of certiorari in this Court (No. 71-1406, O.T. 1971), which the Board opposed, and which was denied. 407 U.S. 925 (1972).

Thus, when the District Court, upon finding that the Board's second redistricting plan adopted November

24, 1971[2] met constitutional requirements and equally distributed the population of Adams County among the five districts, ordered a special supervisors election to be held in conjunction with the Congressional elections on November 7, 1972, (App. 5, A66-A67), it was merely carrying out the final judgment of the Court of Appeals, and the Court of Appeals on the second appeal and cross-appeal, in the absence of any significant change in the facts or the law, had no authority to modify that judgment (App. 6, A73). Because of stay orders issued by both the District Court and by the Court of Appeals, that special election, ordered by the District Court to be held on November 7, 1972, has not yet been held.

ARGUMENT

I. The Petition Is Untimely

28 U.S.C. § 2101(c), limiting the time within which a petition for a writ of certiorari may be filed, provides:

> "(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may ex-

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[2]This second redistricting plan is the subject of a timely petition for a writ of certiorari in *Howard v. Adams County Bd. of Supervisors*, No. 73-770, docketed Nov. 13, 1973.

tend the time for applying for a writ of certiorari for a period not exceeding sixty days."

The "sole question" presented in the Petition is "the propriety of the order of the Court of Appeals directing that, upon completion of the administrative details of implementing a new county redistricting plan, each of the five seats on the Board of Supervisors be filled by special election conducted under the Court-approved redistricting plan . . ." (Petition, p. 3). That "order" was rendered July 29, 1971 (App. 2 to the Petition, A43). Since it is a "decree in a civil action" which petitioners intend "to bring . . . before the Supreme Court for review," their failure to file their Petition within 90 days "after entry of such . . . decree," no extension having been granted or applied for, makes their Petition now, filed more than two years after entry of the order, out of the time limitations imposed by 28 U.S.C. § 2101.

Even if the July 29, 1971 Order can be considered interlocutory, at the most it must have merged with the Fifth Circuit's January 6, 1972 judgment, and the Petition still is untimely. Sound judicial administration, as well as the provisions of § 2101(c), militate against permitting parties to continue to raise an issue decisively settled early in the litigation again at every subsequent stage, without any significant change in the facts or law, in the hopes that years later they might be able to remedy their early failure to seek review in this Court by attempting to petition for review of some later decision holding that the matter already had been settled.

II. The Order of the Court of Appeals Is Clearly Correct, and Presents No Conflict of Decision or Important Question of Federal Law.

The decision of the District Court, affirmed by the Fifth Circuit (and for which review was not sought by the Board), (1) holding that the Board's November 2, 1970 redistricting plan containing three districts with population deviations greater than 10 percent, and a span of deviations of 22.15 percentage points, failed to meet constitutional equal population requirements and (2) requiring that the Board devise a new, constitutionally acceptable plan, clearly was correct. *Burns* v. *Richardson*, 384 U.S. 73, 90-93 (1966) (alternative basis of apportionment valid only if "not substantially different from that which would have resulted from the use of a permissible population basis"); *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971) (invalidating state legislative redistricting providing deviation spans of 24.78% and 28.20%); *Abate* v. *Mundt*, 403 U.S. 182 (1971) (deviation of 11.9% tolerated as a maximum). The deviations present in the plan were not justified as necessary to any compelling governmental need; the petitioners' planning agents simply miscalculated.

The only real question then presented, if the Petition can be considered at all, is whether the Court of Appeals was correct in ruling that these plaintiffs should not be required to await the expiration of the supervisors' four-year terms, until January, 1976, before their constitutional right to elections based on districts equal in population could be vindicated.

In rendering its decree, the Fifth Circuit had before it findings of fact by the District Court showing that at least in this century Adams County voters, and particularly Adams County Blacks, had never been able to participate in elections which fully conformed to the Constitution and laws of the United States. Prior to the passage of the Voting Rights Act of 1965, qualified Black voters "were substantially disfranchised." See, *United States* v. *Mississippi*, 380 U.S. 128 (1965). Members of the all-white Board of Supervisors elected in the 1967 county elections, the first since the passage of the Voting Rights Act, were elected under an at-large, countywide scheme which this Court in 1969 held violative of rights conferred by Section 5 of the Voting Rights Act of 1965, *Allen* v. *State Bd. of Elections*, 393 U.S. 544 (1969), and which the Department of Justice subsequently concluded was racially discriminatory both in purpose and effect. The District Court refused to stay the 1971 county elections, but ordered that they go forward under a redistricting plan which unconstitutionally debased and diluted the voting strength, not only of Blacks, but all the qualified voters of Adams County.

On these facts showing that Blacks had been denied access to the political processes and equal opportunities to elect public officials of their choice, the Fifth Circuit was under a constitutional duty to render a decree promptly and effectively to remedy the effects of past and present discrimination. *White* v. *Regester*, ___ U.S. ___, 37 L.Ed.2d 314, 326 (1973); *Louisiana* v. *United States*, 380 U.S. 145, 154 (1965). The decree struck the proper balance between disruption of the

impending 1971 county elections and delaying the vindication of respondents' constitutional rights for four more years.

The remedy of ordering a special election, shortening the terms of office of officials elected under an unlawful election scheme, and providing for the election of new officials once the legal defect (malapportionment) had been removed, as fully in accord with the practice of the Fifth Circuit in other similar cases, e.g., *Keller* v. *Gilliam*, 454 F.2d 55 (5th Cir. 1972); *Hall* v. *Issaquena County Bd. of Supervisors*, 453 F.2d 404 (5th Cir. 1971) (Order of July 29, 1971); *Taylor* v. *Monroe County Bd. of Supervisors*, 421 F.2d 1038 (5th Cir. 1970); *Smith* v. *Paris*, 386 F.2d 979 (5th Cir. 1967). Further, the Fifth Circuit also has observed that

> "the Mississippi courts have . . . not been averse to the requiring of a new election when defects have necessitated the invalidating of the regularly scheduled election. See Ulmer v. Currie, 245 Miss. 285, 147 So.2d 286; Wallace v. Leggett, 248 Miss. 121, 158 So.2d 746; and Hayes v. Abney, 186 Miss. 208, 188 So. 533." Taylor v. Monroe County Bd. of Supervisors, supra, at 1042.

Under these circumstances, the Court of Appeals had the discretionary authority to order new elections, and this Court has fully affirmed that authority and has affirmed similar orders in several cases, *Hadnott* v. *Amos*, 394 U.S. 358 (1969); *Toombs* v. *Fortson*, 241 F. Supp. 65, 71 (N. D. Ga. 1965), *aff'd* 384 U.S.

210 (1966); *Drum* v. *Seawell*, 249 F. Supp. 877, 881-82 (M.D.N.C. 1965), *aff'd* 383 U.S. 831 (1966); *Mann* v. *Davis*, 238 F. Supp. 458 (E.D. Va. 1964), *aff'd sub nom Hughes* v. *WMCA*, 379 U.S. 694 (1965); *Moss* v. *Burkhart*, 220 F. Supp. 149 (W.D. Okla. 1963), *aff'd sub nom. Williams* v. *Moss*, 378 U.S. 558 (1964).

The cases relied upon by petitioners do not deny that authority — in fact they affirm it — but hold only that on balance in certain circumstances not presented here new elections are inappropriate. In *Allen*, supra, novel questions were presented; no novel questions were presented here. In both *Connor* v. *Williams*, 404 U.S. 549 (1972), and *Georgia* v. *United States*, ____ U.S. ____, 36 L.Ed.2d 472 (1973), new legislative elections would have been required throughout the entire state, with enormous expenditures of time and money, while here new elections have only been ordered in a single county in which expenditures of time and money will be considerably smaller.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be denied.

Respectfully submitted,

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